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IN THE

Supreme Court of the United States

OCTOBER TERM, 1893.

JAMES STEEL, ADMINISTRATOR WITH THE WILL ANNEXED OF THE ESTATE OF BEN HOLLADAY, DECEASED, APPELLANT,

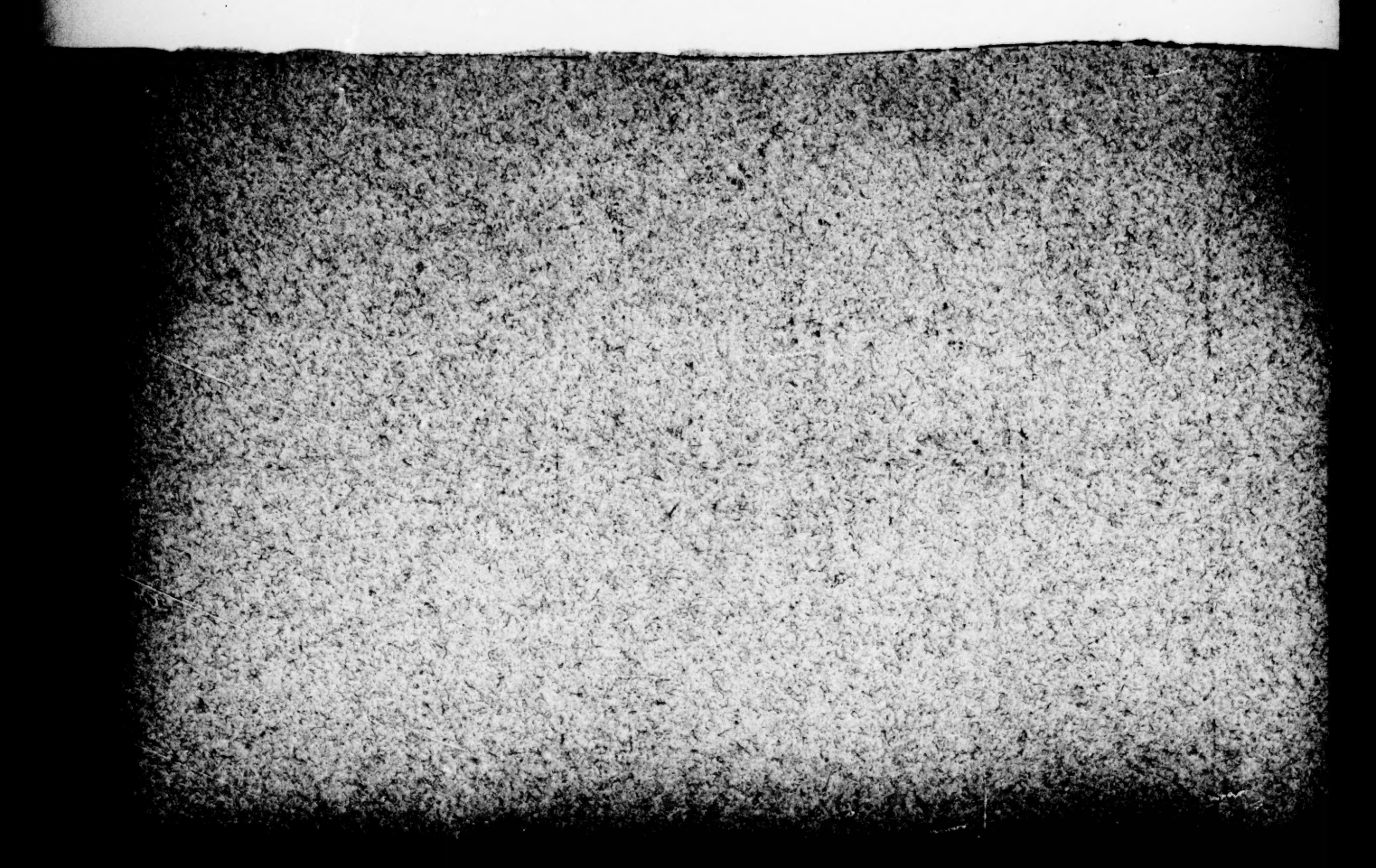
v.

THE PHŒNIX INSURANCE COMPANY OF BROOKLYN, APPELLEE.

Reply to Appellee's Brief.

GEO. H. WILLIAMS,
of Counsel for Appellant.

F. W. BALTES & CO., PRINTERS, 220 OAK ST



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OCTOBER TERM, 1893.

JAMES STEEL, Administrator with the will annexed of the Estate of Ben Holladay, deceased,
Appellant,
v.
THE PHŒNIX INSURANCE COMPANY OF BROOKLYN, *Appellee.*

To the elaborate brief of the insurance company we submit a brief reply.

We cannot suppose that this court, at this stage of the proceedings, will decide that the United States Circuit Court for the District of Oregon had no jurisdiction in equity to hear and determine this case.

If this court did not decide when this case was here on demurrer that the plaintiff herein had a standing in a court of equity, it did not decide anything.

These are the facts: The United States Circuit Court for the District of Oregon heard the case on demurrer. It then came here on demurrer and was sent back to the Oregon court, where it was tried upon the pleadings and evidence, and then retried on its merits in the Circuit Court of Appeals.

Will this court now hold upon *certiorari* that all these proceedings have been without any jurisdiction in the several courts, and dismiss this suit upon a point which can in no possible way affect or be a rule of decision in any other case? If this objection is not decisive, we claim that this court, in its former decision in this case, decided the jurisdictional question in our favor, and that our contention is fully supported by the other authorities cited in our brief, and we are willing to allow the twenty-three pages of the appellee's brief as to this matter to go without further comment.

LIMITATION OF SUIT.

Counsel for the company agree with us that the distinction which Judge Deady attempted to make in this case between the date of the fire and the date of the loss was wrong, and that the meaning and effect of the various terms used in connection with insurance policies as to the limitation of time are the same. This is a reasonable and just view to take of the subject, and creditable alike to the good sense and candor of the learned counsel for the appellee.

All questions, therefore, as to whether or not the expressions "loss occur," "loss accrue," "date of

loss," "date of fire," and similar expressions in policies of insurance have different meanings, is eliminated from this discussion.

It is agreed that they all have the same meaning.

This court, then, has to decide, first, which is the more reasonable and just construction of the limitation clause in policies of insurance — the one for which we contend, or the one for which the defendant contends. Second, which construction is supported by the weight of authority.

We claim that our construction is more reasonable and just than the contrary, for the following reasons:

First: No man's right to recover his money or property ought to be prejudiced by his delay in suing therefor, when such delay is caused by his legal disability to sue. We believe this is a universal rule.

Second: To give a policy-holder one year in which to sue after his right of action has accrued is reasonable and fully within the reasons upon which courts sustain contractual limitations, which reasons are that any matters in dispute ought to be disposed of while the facts are fresh in the memory of the witnesses.

Third: According to the literal terms of the policy, the insurance company has the power to deny to the insured the right to sue at all within twelve months after the fire, and, therefore, one of two things must follow, a company can refuse payment of the loss and prevent a suit for its recovery, or the courts must carry out the spirit of the policy regardless of its terms. Our argument

upon this point is this: Counsel for the insurance company admit, and the courts holding with them agree, that if the insurance company is unreasonable, that is to say, if it refuses to accept the proofs of loss or falsely pretends to rebuild or repair, or in some such way, under the privileges reserved to it under the policy, frit-ters away the twelve months after the fire, the courts will interpose and give the insured a reasonable time after the expiration of the year in which to sue, and our claim is, that if the court can construe away the letter of the policy under these circumstances, it can, with a much clearer right, construe the policy so as to give the insured the whole twelve months in which to sue.

Fourth: The fact is that insurance companies pretend in their policies to give to the insured protection and a right to recover damages for alloss by fire, but by a jungle of qualifications, conditions and exceptions, take away what they pretend to give, and are so confusing and contradictory in the provisions of their policies that learned courts are puzzled to determine their true meaning and effect.

We think for these reasons that the most liberal construction for the insured, adopted by the courts, ought to be the rule of decision in this case.

Fifth: Taking all the provisions of the policy together, we submit that it is fairly inferable therefrom that it was the intention of the parties that the insured should have an existing right of suit for twelve months.

The intention to be arrived at must be the intention of the insured as well as of the insurer. What was the

intention? Was it the intention that the right of suit should exist for ten months, six months, or one month? Was it the intention of the insured that the company should have the right to give him as much or as little time within the twelve months' limitation as it chose, with no right whatever secured to him by the policy in respect to that matter?

All the laws of the land and all the courts hold that a limitation of suit does not run against persons under a disability to sue, and the parties must be presumed to have contracted with reference to this well-known rule.

As is said by the New York Court of Appeals in *Hay* v. *Star Fire Insurance Co.*, 77 N. Y. 243: "The parties intended to shorten the time for commencing an action, but an intent to violate the universal rule applicable to this subject, founded alike in principle and practice, before referred to, ought not to be imputed."

WEIGHT OF AUTHORITIES.

We respectfully deny that our authorities are cited from any careless commentator, or are a "dummy battery," as alleged in the appellee's brief. All of the cases cited by us on the limitation question are cases in which the suit was commenced after the limitation had expired and were maintained.

Some of the cases show, to use the language of Justice Bradley in *Insurance Co.* v. *Norton*, 96 U. S.

244, "the readiness with which courts seize hold of any circumstances that indicate an election or intent to waive a forfeiture."

And other of the cases are constructions of policies in accordance with our contention.

We think that the decisions of the courts of New York, *Hay* v. *Star Fire Insurance Co.*, 77 N. Y. 243; Iowa, *Miller* v. *Insurance Co.*, 70 Iowa, 704; Minnesota, *Chandler* v. *St. Paul Fire & Marine Insurance Co.*, 21 Minn. 85; California, *Case* v. *Insurance Co.*, 83 Cal. 473; West Virginia, *Barber* v. *Fire & Marine Insurance Co.*, 16 W. Va. 658; New Hampshire, *Leach* v. *Insurance Co.*, 58 N. H. 245; Michigan, *Voorhees* v. *Benefit Society*, 91 Mich. 469; Nebraska, *German Insurance Co.* v. *Fairbank*, 49 N. W. Rep. 711; Arkansas, *Sun Insurance Co.* v. *Jones*, 15 S. W. Rep. 1034; Utah, *Hong Sling* v. *Royal Insurance Co.*, 30 Pac. Rep. 307; the decisions of the United States Circuit Courts, cited in our brief, and the decision of the Circuit Court of Appeals in this case, in which our construction of the limitation clause in insurance policies is sustained, show the weight of authority in our favor.

The text-books are to the same effect. 2 Wood on Insurance, section 469; 2 May on Insurance (3d edition) sections 487 and 492.

As to the decisions referred to as holding a contrary doctrine: In *Fullam* v. *New York Insurance Co.*, 7 Gray 61, the fire was July 21, 1853, limitation six months,

suit commenced August 10, 1854. The court held that the limitation was not void. The question here was not in that case. The decision in Washington was by a divided court. The decision in Virginia was by a divided court. In the case of *Blanks* v. *Hibernian Insurance Co.*, 36 La. Annual, 599, the limitation was one year. Suit was brought eighteen months after the fire, and the court says that, excluding the time under which the plaintiff was denied the right to sue, the action was not brought within one year after the expiration of that time. The limitation in the Kansas case provided that the suit should be brought within one year exclusive of any time consumed in arbitration or appraisement.

Our learned friends on the other side are pleased to stigmatize the arguments of the courts which uphold our views of the policy in question as weak, and commend the "clear cut" reasoning of the decisions upon which they rely.

There is one authority on their side of the case which they overlooked. It is this:

Shylock: "I'll have my bond; I will not hear thee speak: I'll have my bond; and, therefore, speak no more. * * * I'll have no speaking; I will have my bond."

This is "clear-cut," and here is where the "Jew," to which the counsel for the appellee introduced us in his brief, comes into this case. There is an implication of law, however, applicable to said bond, which deprived

its owner of his "pound of flesh," and we think there is a similar implication applicable to the policy in this case.

We are sorry that our friends on the other side of the case are out of patience with the courts for saying that the weight of authority is against them. Judge Deady says in the Spare case, as to the construction, that the limitation does not commence until the right of action accrues. "This construction is supported by the decided weight of authority, and, in my judgment, is correct upon principle."

The North Dakota court, whose opinion fills two or three pages of the appellee's brief, says: "It is undoubtedly true that a majority of the adjudications so interpret these limitations as to allow the full time to sue after the right of action has accrued."

In *Bradley* v. *Phenix Insurance Co.*, 20 Mo. App., the court, after stating that certain courts had held that the limitations in policies of insurance did not begin to run until the right of action accrued, says: "It must be confessed that this rule of construction is supported by the weight of authority." No doubt these declarations by the courts upon whose opinions opposing counsel rely, try their patience, but "A friend should bear his friends' infirmities."

WAIVER OF LIMITATION.

We presume the court will find as a fact, without hesitation, that the receiver, Thompson, had a right, from the actions and representations of the defendant, to believe that it would pay for the loss, until he was notified to the contrary, on August 27th, 1884. The effect of this fact is another question. The twelve months' limitation in the policy is a matter of contract which the parties, of course, can modify or change at their pleasure.

Suppose an insurance company, after a fire, promises the insured to pay for the loss, and the insured, relying upon this promise, delays suit, and at the end of eleven months after the fire the company notifies the insured that it will not pay, ought not this in reason and justice to be treated as a modification of the original contract by the consent of both parties? Would the courts allow the insured to be deprived of any rights he might otherwise have by such a trick or fraud?

We say that when an insurance company gives the insured to understand that it will pay for a loss, and the insured acts upon that promise, a new or modified contract is made between the parties, and the obligations under the old contract, to the extent of this understanding, are suspended, and if the insurance company violates this understanding, the rights of the insured under the old contract are revived and stand exactly as they did before such understanding was made. This is reasonable and just.

When the court undertakes to fix the limitation in a policy of insurance at ten, six, or two months, or for any other time that it may judge reasonable, it simply undertakes to make a contract for the parties. There is nothing of that kind in the policy, and the parties have agreed to no such thing. The parties agreed in the policy that the limitation should run from the date of the loss or from the time the right of action accrued to the insured.

We think the courts have no right to change this contract, and must hold that the limitation of twelve months commences to run from one or the other of the above dates, unless the contract has been changed or modified, and another time fixed by the consent of the parties for the limitation to commence.

The case of *Spare* v. *Home Insurance Co.* was decided by Judge Deady in August, 1883. No appeal was taken from that decision, and it stood as the law of the land in Oregon, that the twelve months limitation in a policy of insurance did not begin to run until the right of action had accrued.

In April, 1884, the policy in this case was issued, and the parties are presumed to have known the law and to have contracted with reference to it. Therefore it follows that it was the understanding of the parties, and is the legal effect of the policy in question, that the insured should have twelve months in which to bring suit after his right of action accrued.

As to the cases cited upon this point in the defendant's brief, the court will see by reference to them that the precise question as to when the limitation commences to run was not argued or decided in them. They relate generally to the subject of the waiver.

Counsel for appellee in their brief suggest that the rule for which they contend is necessary to prevent frauds upon insurance companies.

But it is no more effective for that purpose than the rule for which we contend. On the contrary, their construction of the policy will give insurance companies every advantage. Under it everything is left in uncertainty, and subject to the will of the company. They can make the limitation what they please, and the insured has no rights which they are bound to respect. Anything about fraud comes with an ill-grace from defendant. It demands and receives from Thompson, the Receiver, after the fire, the three hundred dollars premium, which it keeps, and then refuses to pay for the loss on the ground that the policy ran to his predecessor.

There is no defense to this conduct in law or morals.

We beg to renew our reference to the opinion of Judge Hawley of the Circuit Court of Appeals, which seems to us impregnable, both upon principle and authority, and venture once more to suggest whether or not this is a proper case to be heard by this court upon *certiorari*.

GEO. H. WILLIAMS,
of Counsel for Appellant.

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JAMES STEEL, Administrator with the Will annexed of the Estate of Ben. Holladay, deceased, *Appellant*,

vs.

THE PHENIX INSURANCE COMPANY of Brooklyn, *Appellee*.

Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

APPELLEE'S BRIEF.

L. B. COX, OF COUNSEL FOR APPELLEE.

BEN C. IRWIN & CO., Blank Book Makers, Printers, Lithographers, Portland, Or.

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APPELLEE'S BRIEF.

STATEMENT OF THE CASE.

This cause has run a long and checkered career and is now at the bar of this Court for final decree. The suit was commenced by filing a bill of complaint in the Circuit Court of the United States for the District of Oregon, by D. P. Thompson, as

receiver, on July 10th, 1885, (the record commences with an amended bill of complaint upon which the cause was tried, which was filed November 25th, 1885, the original bill not being printed by stipulation), the relief sought being the reformation of an insurance policy, and the recovery thereon for a loss sustained by fire. On January 29th, 1886, the bill was dismissed by Judge Deady, upon a demurrer raising the point that the suit had not been commenced within the period prescribed by the limitation clause of the policy (for opinion see 11 Saw., 276); an appeal was taken to this Court and the decree of the lower court was reversed, and the cause remanded for trial upon its merits (136 U. S., 287); thereafter issue was joined, the evidence taken and final hearing had thereon, and on October 19th, 1891, the bill was again dismissed (47 Fed. Rep., 863); an appeal was taken from this order to the United States Circuit Court of Appeals for the Ninth Circuit, where the cause was, on July 18th, 1892, reversed by a divided court, Gilbert and Hawley, J J., for reversal, and McKenna, J., for affirmance (7 U. S. App., 325, *sub nom. Holladay's Administrator vs. Phenix Ins. Co. of Brooklyn*; 2 C. C. A., 463); an application for a rehearing was made to the Circuit Court of Appeals and was denied, whereupon a petition for a writ of certiorari was preferred to this Court and was allowed on January 30th, 1893, and the cause is now here in response to the mandate of the writ.

A slightly fuller historical review of the controversy will show these facts, viz.: On the 17th day of November, 1883, there was pending in the Circuit Court of the State of Oregon for Multnomah County, a suit brought by Benjamin Holladay against Joseph Holladay, in which was involved a large amount of property, including that mentioned below, and it appearing to that court advisable to appoint a receiver for its care and management, Edward S. Kearney was nominated, and he thereafter qualified. On the 21st day of April, 1884, Kearney procured a policy of insurance to be written by the appellee in his favor, as receiver, for the sum of four thousand dollars upon a half interest in the Clarendon hotel building in the City of Portland, and one thousand dollars upon a like interest in the hotel furniture, the property insured being in controversy between the Holladays. The insurance ran one year from April 27th. Kearney afterwards tendered his resignation as receiver and on May 14th, 1884, an order was made by the court accepting his resignation and appointing D. P. Thompson as his successor, the change to take effect upon the qualification of the latter. Thompson qualified May 19th, 1884, and the following night the insured property was destroyed by fire. Thompson, acting as receiver, prepared proofs of loss and submitted them to the appellee, and also paid the premium, upon which a term of credit had been in the first place extended.

Meanwhile a controversy had arisen between the parties as to the company's liability, it claiming that the contract made with Kearney, while running to him as receiver, did not extend to his successor, and negotiations for a settlement of more or less importance were carried on between the receiver and certain agents of the appellee for some time. These negotiations having finally ended without result, this litigation was instituted by Thompson. Pending the prior hearing of the cause in this Court, Benjamin Holladay had been determined to be the owner of the property which was destroyed by fire, the receiver had been discharged, Benjamin Holladay had subsequently died, and upon the filing in the lower court of the mandate of this Court the appellant, as administrator of his estate, was substituted as complainant in lieu of the receiver. The cause having been thus revived, issue was joined and a final hearing had upon the evidence adduced, as has been mentioned. The bill of complaint upon which the cause was tried is to be found on page 1 of the printed record, and the answer on page 21; as they are both somewhat lengthy we will not encumber the brief with their reproduction.

Counsel for appellant, in effect, appeal to the Court for a reargument of our petition for the writ of certiorari, but, as the matter was submitted upon full briefs on behalf of both parties and was considerately determined, we shall assume

that the Court are satisfied with the exigencies which impelled them to grant the writ, and address ourselves to a discussion of the issues presented by the record.

The petition for the writ asks this Court to review the determination of the Circuit Court of Appeals upon two points: First, as to the jurisdiction of a court of equity over the controversy; and, secondly, as to the construction of the limitation clause to be found in the policy. We understand the cause is to be heard in all respects as it stood in the Circuit Court of Appeals, and while the discussion of the entire case really hinges upon these two propositions, in the appellant's brief will be found his formal assignment of errors submitted with his appeal. The second of the points we have stated is the one of most importance as a matter of general interest, and is probably the consideration which chiefly moved this Court to grant the writ; and yet we apprehend that, as the entire cause is here, all its issues will receive attention.

Upon the first point it would seem clear that the decision of the Court of Appeals is unsustainable. Counsel for appellant suggest in their brief that the point decided in the majority opinion of the Court of Appeals, to the effect that the appellee was liable to respond to Kearney's successors in interest for any loss happening under this policy by reason of its language and without any reformation, was not argued before that court. This is measurably true. The record shows that the question of reformation has been one of the principal and most stubbornly contested issues from the inception of the cause to the present day, but the appellee's argument has been that it insured Kearney only, and that no reformation should be allowed, for that would violate not only the contract actually made between the parties, but the contract they intended to make,— in other words, that the policy on its face limited the right of recovery to Kearney alone, and that it expressed the true intention of the parties. On the other hand, the Court of Appeals held that the contract on its face extended the right of recovery to Kearney's successor and needed no reformation. To this extent the opinion does introduce a new point, but it is an entirely indefensible

one, as we shall clearly show. The decisions in the court of original resort turned upon the construction of the limitation clause of the policy.

Accepting the judgment of the majority of the Court of Appeals that the appellant had a policy, which, *on its face*, gave him a right of action in his own name without reformation, and that the action was not barred by the limitation clause, there was presented a proper subject for an action at law, plain and simple, adequate and speedy, in which the plaintiff would have been entitled to a judgment on the pleadings. In the majority opinion of the court it is said:

"1. Can the policy be reformed?

"The right of plaintiff to have the policy reformed, if the action can be maintained after it is reformed, so as to be made payable to the receiver or his successors in office, and thereby conform to the intention of the parties,—if any reformation in that respect is necessary,—is by the admissions in the answer and proofs upon the trial rendered too clear for any discussion upon the subject.

"*It is, however, proper to state in this connection that we are of opinion that the intent of the parties appears upon the face of the policy itself, and that no reformation is required in order to enable plain-*

tiff to maintain the suit as a representative of the interest of Holladay in said property." (Record, pp. 57-8). The italics are, of course, ours.

This is a perfect case of *felo de se*, for, if no reformation is required the *suit* will not lie. Could the appellant's cause have been more completely read out of court? It would have been impossible to more clearly find that the claim of jurisdiction had failed, and there was no alternative but to dismiss the suit. There was no escape from this result under the decisions of this Court, for we have the most abundant authority for asserting that the only proper decree to be entered by a federal court of equity in such a predicament is one in favor of the defendant, dismissing the complainant's bill.

In *Buzard vs. Houston*, 119 U. S., it was said by Mr. Justice Gray, in delivering the opinion of the Court, at page 351:

"In the Judiciary Act of 1789, by which the first Congress established the judicial courts of the United States and defined their jurisdiction, it is enacted that 'suits in equity shall not be sustained in either of the courts of the United States, in any case where plain, adequate, and complete remedy may be had at law.'"

Also that by the seventh amendment of the constitution "In suits at common law where the value in controversy shall exceed twenty dollars the right of trial by jury shall be preserved," and the opinion proceeds:

"'The effect of the provision of the Judiciary Act, as often stated by this Court, is that 'when ever a court of law is competent to take cognizance of a right and has power to proceed to a judgment which affords a plain, adequate, and complete remedy without the aid of a court of equity, the plaintiff must proceed at law, because the defendant has a constitutional right to a trial by jury.' (Citing cases). In a very recent case the court said: 'This enactment certainly means something, and if only declaratory of what was always the law it must at least have been intended to emphasize the rule and to impress it upon the attention of the courts.'"

And again, on page 352:

"In cases of fraud or mistake, as under any other head of chancery jurisdiction, a court of the United States will not sustain a bill in equity to obtain only a decree for the payment of money by way of damages when the like amount can be recovered at law in an action sounding in tort or for money had and received. (Citing cases)."

In the case of *Dowell vs. Mitchell*, 105 U. S., 430, the suit was upon promissory notes secured by mortgage upon property of a deceased partner. Upon its appearing that the mortgage was not valid it was held that a decree could not be given against the maker of the notes, the Court saying, page 432:

"When this fact was established by the evidence the court below, sitting as a court of equity, had no jurisdiction to proceed in the cause. There was nothing on which it could act but the promissory notes, and to enforce their payment the complainants had a plain, adequate and complete remedy at law."

And so well are these principles established, and so thoroughly have they commanded the approval of this Court, that it has been repeatedly held that courts would and should take the objection *sua sponte*, and dismiss such suits, whether the point were suggested by counsel or not.

Parker vs. Winnepiseogee Lake Cotton and Woolen Manufacturing Co., 2 Black, 545.

Lewis vs. Cocks, 23 Wall., 466.

Killian vs. Eddinghaus, 110 U. S., 568.

These are but a few of the many adjudicated cases which might be cited.

Ins. Co. vs. Gillett, 54 Md., 219, from which this extract is printed in the brief:

"But where the action arises upon a written contract, which from mistake or fraud fails to express the actual agreement of the parties, it is a matter peculiarly within the jurisdiction of a court of equity to reform such contract and to grant relief in accordance with the intention of the parties. The fact, therefore, that the complainant might have enforced the payment of the loss to the property insured in an action at law on this policy is no answer to this exercise of jurisdiction by a court of equity upon the facts stated in the bill."

Upon reading this passage we were minded to apply to the opinion the observation of Lord Bacon that, "if a case in law have no cousin or brother, it is a sure sign that it is illegitimate," but looking to the report we find counsel have broken a paragraph, the conclusion of which is: "Nor are we prepared to admit that his remedy at law would have been as *certain* and *adequate* in all respects as in a court of equity." This saving clause may suffice to relieve the decision of the taint of heterodoxy.

Is there anything in the suggestions of appellant's counsel? They resolve themselves into the simple proposition that Thompson's legal

adviser "probably" thought he was pursuing the proper course in commencing a suit in equity instead of an action at law. But can the opinion of counsel, whether sound or unsound, confer a right upon a client which would not otherwise exist, or deprive his antagonist of one secured to him by the law of the land? It is the province of the legal profession to advise men as to their rights and liabilities; all the cases in which litigants have been sent from equity to law, or *vice versa*, have arisen from mistakes of counsel in selecting the forum for the redress of their clients' grievances, and this is the first instance in which we have met the argument that one or the other tribunal should sustain jurisdiction over a cause, plainly denied it, on the ground that the counsel bringing the matter before the court thought he was adopting the proper method of procedure. Such questions are to be determined upon the court's view of the nature of the controversy, and not upon that of counsel for either party. We very cheerfully make the statement here that the counsel now representing the appellant were not the advisers of Thompson at the time this litigation was instituted.

In *Dowell vs. Mitchell*, *supra*, there was no choice of forums presented. The complainant sought to foreclose a mortgage, and he could go nowhere else than into a court of equity to secure this relief. In connection with his decree of foreclosure he asked judgment for the amount of the

notes secured by the mortgage. The fact that he thus had but one avenue for realizing upon his lien, to which he conceived himself to be entitled, did not prevent the court from dismissing his suit when the feature upon which the jurisdiction of the chancery court had been invoked failed.

As we have before said, the only ground upon which it has been claimed the jurisdiction of equity rested, or could in fact be placed in this case, is that it was necessary to reform the policy before Kearney's successor could sue upon it. Without this the appellant would confessedly be without justification in going into equity. The result of the majority opinion of the Court of Appeals is that the appellant might, *upon the face of his policy*, have proceeded at law without let or hindrance for the accomplishment of his ends, and such being the case *he had no right to proceed anywhere else*. Having maintained the jurisdiction of equity over the cause, the court go on to determine substantive issues of fact which constituted the appellee's defense to the appellant's claim, and thus deprived the appellee of the right of having these issues passed upon by a jury, a right guaranteed it by the constitution and the fundamental law from which the power and authority of the court pronouncing the judgment was derived. When it was determined that jurisdiction was vested in a court of law, and by necessary implication that it was *not* vested in a court of equity, so far from enforcing the result which

this Court have so often and so clearly announced inevitably followed, and dismissing the suit, even if no objection to equitable jurisdiction had been interposed, the Court of Appeals upheld the jurisdiction over the head of the appellee and in the face of its earnest and persistent protest and contention. We respectfully but earnestly submit that this was a denial of the appellee's substantial rights, and was in direct contravention of the constitution of the United States, the acts of congress, and the adjudications of this Court.

We will add to what has been said upon this point that whatever legal construction may be placed upon this policy, the appellee had an undoubted right to confine its contract to Kearney, even though he was receiver, and was not bound to continue the risk upon the property when represented by some successor in whose selection the appellee could have no voice, nor to run increased hazard in the vicissitudes of the litigation which was the occasion of Kearney's appointment. The appellee's contention was that it intended to confine, and did confine, its obligation to Kearney alone; and that there was reason in its position is manifested by subsequent events. In the case of *Holladay vs. Holladay* an order was made by the State court of Oregon on May 14th, 1884, substituting Thompson as receiver for Kearney, directing Kearney to transfer all property in his hands as receiver to Thompson upon his qualification, which consisted in filing the bond prescribed by

the court, and further directing that, "*upon the qualification of the said receiver, the said late receiver and the parties to this suit* **shall cease to exercise any control over any of said property and business,** *except to transfer the same as aforesaid.*" (Record, pp. 52-3).

On May 19th Thompson's bond was filed and approved by the court (record, pp. 54-5), whereupon the foregoing order went into effect, and no one except Thompson was allowed to exercise any control over the property. But he testifies:

"Q. Do you remember the date when you became receiver?

"A. I think on the nineteenth day of May, 1884.

"Q. When was the building destroyed by fire?

"A. I can not give the exact date, but it was about that date; within a few days of the nineteenth day of May, 1884, either before or after.

"Q. On the day upon which that property was destroyed by fire had it been turned over to you by Kearney, or was it still in his possession?

"A. I believe it was still in Kearney's possession.

"Q. Can you state how long it was after you were appointed before the possession of the prop-

erty which Kearney held as receiver was transferred to you?

"A. No, I can not; but it was not more than three or four days.

* * * * * *

(CROSS) "Q. Mr. Thompson, what acts of delivery from Mr. Kearney to yourself took place in regard to this property?

"A. By him furnishing me a list of the property and my accepting the lists after examining the property to see if I was obtaining the possession of it and giving him a receipt for it." (Record, pp. 46-8).

The fire occurring the night of May 19th, it will thus be seen that no one to whom the appellee might be held responsible was in control of the property, or was exercising any degree of care or watchfulness over its interests.

The first paragraph of the passage above quoted from the majority opinion of the Court of Appeals is also open to exception, viz.:

"The right of plaintiff to have the policy reformed, if the action can be maintained after it is reformed, so as to be made payable to the receiver

or his successor in office and thereby conform to the intention of the parties,—if any reformation in that respect is necessary,—is by the admissions in the answer and proofs upon the trial rendered too clear for any discussion upon the subject."

With due respect to the opinion of the Court of Appeals, we think that it is in fact too clear for discussion that the proofs do *not* establish any such right on the part of the complainant.

As to admissions in the answer, we confidently assert that none can be found to the effect that the insurance company intended or agreed to insure Kearney and his successors in office. On the contrary see record, pages 23, 24 and 25, where the allegations of the bill in that behalf are repeatedly and constantly denied, and it is asserted affirmatively that the company intended to insure *Kearney alone*, and made no agreement other than that contained in the policy.

Of course the answer admits that the company knew that Kearney was receiver merely, and had no personal interest in the property, that the insurance was for the actual benefit of the parties litigant, and that the policy was issued for a term of one year. But that is all consistent with the language of the policy; the policy does in fact insure Kearney as receiver merely and for the

benefit of the Holladay estate; the insurance company insists that it did not agree to do more, whereas the reformation sought here would, in effect, add a new term or condition to the contract to the effect that if any other person should assume the office of receiver, he also should be insured by the policy, whosoever he might be, and without further notice to or consent of the company. There are no admissions in the pleadings to that effect. Such proposed new form or condition is in direct contravention of the provisions of the policy avoiding it for *any change in title or possession*, whether by legal process or otherwise, and forbidding assignment without *the consent of the company endorsed thereon.* (See stipulation No. 1, record, page 8).

The expression, "executors, administrators and assigns," so much relied upon by counsel for appellant as evidence of a mistake, is found, not in the clause designating the person insured, but in that relating to payment of the loss after the fire had occurred; it was doubtless part of a printed form, and its inaptitude, so readily apparent to the trained legal mind of counsel, was probably not observed or appreciated at all by the clerk who wrote up the policy; its use or misuse does not import any significance.

Moreover, if any inference is to be drawn from the language of the policy that the parties intended to make some agreement other than that

expressed therein, it is sufficient to say that such an inference (so far as legitimate) can be drawn as well by a court of law as a court of equity; it is construction of the instrument merely,—the ascertainment of the intention of the parties from the language used, read in the light of surrounding circumstances.

As to the proofs entitling the appellant to reformation, we think the mere statement of the evidence is quite as clear and convincing as any argument which could be predicated upon it. The whole scope of the evidence is very limited, covering altogether only fifteen pages of the record (40-55). We give here all the testimony of Kearney bearing upon the point under consideration, which, with the possible addition of that of the witness Outcalt (record, pp. 44-6), comprises everything bearing upon the subject.

Kearney testifies:

"Q. With whom did you negotiate for that insurance?

"A. Do not remember the man's name. He came into the marshal's office,—I was then United States marshal,—and he was very anxious to get the insurance; he was a heavy-set man, I think of Semitic or Hebrew origin; he looked to me like one of those people; he was very anxious to effect the insurance, and I had it renewed, I think, in the same company.

"Q. You do not remember his name?

"A. No; I can not recall his name.

"Q. You say he applied to you to insure that property in his company?

"A. Yes, sir; he came up to the marshal's office.

"Q. Did he represent, or claim to represent, the Phenix Insurance Company of Brooklyn as agent.

"A. Yes; he pretended to be, I guess likely, the street agent; I do not think he had an office or direct appointment; I want to say this as accurately as I can. It was a company down on Front street that pretended to be the head office, and I took him to be an outside man to get insurance, and they issued the policy; but I do not remember the man's name.

"Q. What representations, if any, did you make to the agent or agents of the insurance company as to the ownership of that property at the time you obtained the policy,—negotiated for the policy?

"A. Well, I had it insured as the Holladay property, of course; it was not my own property; everybody knew that; Holladay built the hotel; it was his property; I told him how I wanted it, of course,—the loss, if any, to inure to the estate; it was not property of mine personally.

"Q. You had no personal interest in the property that was insured?

"A. Not any.

"Q. You insured it as the receiver in the suit of *Holladay vs. Holladay*, did you?

"A. I insured it for the Holladay estate,—for the loss, if any, to be paid to the Holladay estate.

"Q. Was it understood between you and the agent that the policy should cover the interest you represented in the suit of *Holladay vs. Holladay?*

"A. Certainly; it was property in my hands belonging to the Holladays; each brother claimed it.

"Q. This policy provides that E. S. Kearney, receiver for the suit of *Holladay vs. Holladay*, is insured, and that the company agrees to make unto the said assured, their executors, administrators and assigns, all loss and damage that may accrue. Was it the understanding that in case you should cease to be the receiver the money should be paid to your executors, administrators or assigns? Was there an understanding of that kind?

"A. No; that was in case I went out, for I spoke of resigning immediately after I went in; every one knows that; whoever followed me, of course. All there is there they wrote themselves.

They had full knowledge whose property it was; they knew all about that. *I showed that to Fechheimer, and he said that was right enough. I explained to him then about that administrator business; that it was not for me; it was not my property; it belonged to the Holladay estate.* I took the receivership against my own will and got out of it as quick as I could.

"Q. By whom was this policy prepared?

"A. It was prepared down in the insurance office.

"Q. And delivered to you?

"A. Certainly it was. I was to have sixty days to pay the money in. They did all the writing themselves."

CROSS EXAMINATION.

"Q. From whom did you get the policy, Mr. Kearney; do you remember?

"A. I can not call the man's name, as I said before. He came into the office,— a heavy-set man,— and I think he was a Hebrew. *I took him to be a kind of outside agent of the appointed agent down on Front street.*

"*Q. Did you have any talk with the agents who wrote that policy at the time it was written or at any time afterwards before the fire took place?*

"*A. Well, I do not remember that I did; I do not say I did or did not; I do not remember.*

"*Q. You do not call to mind any conversation of that sort?*

"*A. No, sir; I do not.*

"*Q. Did you make any objection to the policy as it was written when it was delivered to you?*

"*A.* **Well, I showed it to Fechheimer and he seemed to think it was right; he was the attorney that the court appointed to look after the business.**

"Q. Acting as your adviser in the receivership?

"A. Yes, sir; he did not charge for that particular item, but he got a salary, and in attending to any case, of course, the court would allow him a fee.

"Q. Then you and your counsel retained the policy as it was delivered to you without objection on your part?

"A. Well, he handed it back to me after looking at it. I did not pretend to be a lawyer at all.

"Q. You kept it ever since?

"A. No, sir; I have not; this is the first time I have seen it for seven years, to my recollection.

"Q. How long did you keep it?

"A. Oh, I was in office as receiver about five months; something like five or six.

"Q. And you turned it over to your successor when you left there?

"A. Yes, sir.

"Q. Then the fact is that from the time this policy was delivered to you until you turned it over to your successor in the receivership by order of the court the policy was kept in your possession without objection to its form on your part?

"A. *I think that is correct. I do not think I made any, sir.* I took it down to Mr. Fechheimer, who was my legal counsel, as I would to yourself if I had employed you, and I would expect you would inform me on that point."

Upon such testimony no court of equity could justly be asked to exercise the extreme remedy of reformation. The policy on its face runs to Kearney alone. There is nothing to indicate that it was to apply also to his successor, whoever he might be. Fire insurance contracts are in their nature personal and are not assignable without the consent of the company, even if there be no prohibitory condition to that effect.

Bergson vs. Builders' Ins. Co., 38 Cal., 541.

Pending the risk the individuality of the insured is material.

Spare vs. Home Mutual Ins. Co., 17 Fed. Rep., 568.

The usual practice of insurance companies is to limit the indemnity to the person named as the insured, and there is nothing in the evidence to establish an intended departure from such practice, or to overcome the presumption of the correctness of the written instrument.

There is not a word in Kearney's testimony showing that he asked for, or expected to receive, a policy containing such peculiar terms as are now contended for; on the contrary, he received this policy without objection, submitted it to his attorney, *called his attention to the insertion of the term "administrators,"* and, upon his advice, accepted and retained it. Kearney does not appear at any time to have made any objection to the form of the policy, or to have claimed that its terms were other than in accordance with the verbal arrangements.

Moreover, the preliminary negotiations were not had with the agent of the insurance company, but with a gentleman of "Semitic origin," who was supposed to be an outside man or solicitor, and who, by force of stipulation 8 of the policy (record, p. 10), was the agent of the insured. The

record is absolutely silent as to what the company's agent, who signed and gave vitality to the policy, understood to be the terms of the arrangement. There is no pretense that *he* agreed to anything except what is found in the policy.

How, then, can it be said that there was a mutual mistake common to both parties to the instrument, or that both have done what neither intended?

Hearne vs. Marine Ins. Co., 20 Wall., 490.

And, in the absence of evidence of *any* mistake, either on the part of Kearney or the company's agent, how can it be claimed that there is here fulfilled the condition that the "evidence of a mistake and of the alleged modification must be most clear and convincing, in the language of some judges, 'the strongest possible,' or else the mistake must be admitted by the opposite party; the resulting proof must be established beyond a reasonable doubt. Courts of equity do not grant the high remedy of reformation upon a probability, nor even upon a mere preponderance of evidence, but only upon a certainty of error."

2 Pom. Eq. Jur., Sec. 859.

This brings us to the points upon which the decisions of the lower court turned.

THE LIMITATION CLAUSE.

Under this head two points are raised: The actual construction of the language used, and an alleged waiver of the restriction. The provisions of the policy which affect the question are these (record, pp. 8-10-13):

From the body of the policy:

"And the said Phenix Insurance Company hereby agrees to make good unto the said assured, their executors, administrators and assigns, all such immediate loss or damage, not exceeding in amount the sum or sums insured, as above specified, nor the interest of the assured in the property except as herein provided, as shall happen by fire to the property so specified from the twenty-seventh day of April, one thousand eight hundred and eighty-four at 12 o'clock at noon to the twenty-seventh day of April, one thousand eight hundred and eighty-five at 12 o'clock at noon, the amount of loss or damage, to be estimated according to the actual cash value of the property at the time of the loss, and to be paid sixty days after the proofs of the same required by the company shall have been made by the assured, and received at the office in Chicago, and the loss shall have been ascertained and proved

in accordance with the terms and provisions of this policy, unless the property be replaced or the company shall have given notice of their intention to rebuild or repair the damaged premises."

From the appended stipulations:

"9. Persons sustaining loss or damage by fire shall forthwith give notice in writing of said loss to the company, and as soon thereafter as possible render a particular account of such loss, signed and sworn to by them, stating whether any and what other insurance has been made on the same property, giving copies of the written portions of all policies thereon, also the actual cash value of the property, and their interest therein; * * * *

"10. The amount of sound value and of damage to the property, whether real or personal, covered by this policy or any part thereof may be determined by mutual agreement between the company and the assured; or, failing to agree, the same shall then, at the written request of either party, be submitted to competent and impartial arbitrators, one to be selected by each party, the two so chosen, in case of disagreement, to choose a third, and the award of any two of whom, in writing under oath, shall be binding and conclusive as to the amount of such loss or damage, but shall not determine the validity of the contract nor the liability of this company,

nor any other question except only the amount of such loss or damage. Each party shall pay their own arbitrator, one-half the cost of third; that it shall be optional with the company to repair, rebuild or replace the property lost or damaged with like kind and quality within a reasonable time, giving notice of their intention to do so within sixty days after receipt of the proofs herein required, and until such proofs, plans and specifications, declarations and certificates are produced, and examinations and arbitrations permitted by the claimant and had, the loss shall not be payable.

* * * * * *

"13. It is furthermore hereby expressly provided and mutually agreed that no suit or action against this company for the recovery of any claim by virtue of this policy, shall be sustainable in any court of law or chancery until after an award shall have been obtained, fixing the amount of such claim in the manner above provided, nor unless such suit or action shall be commenced within twelve months next after the date of the fire from which such loss shall occur; and should any suit or action be commenced against this company after the expiration of the aforesaid twelve months, the lapse of time shall be taken and deemed as conclusive evidence against the validity of such claim, any statute of limitation to the contrary notwithstanding."

Both the points which have been advanced do not, however, necessarily arise. The appellant's first contention is, that under the clauses set forth above, as the loss is not payable until sixty days after proofs of loss have been furnished, the limitation does not commence to run until the expiration of this period; and, as the fire occurred on May 19th, 1884, and the suit was brought July 10th, 1885, if this position be allowed, the suit was timely, without regard to any question of waiver. But if the other view is held, the matter of the alleged waiver will arise, and it is, of course, necessary for us to present our argument upon both propositions.

Perhaps we can introduce our discussion of the matter in no better way than by a consideration of the opinion rendered in this Court upon the first appeal (136 U. S., 287). In the subsequent stages of the case this decision has been strenuously urged upon the lower courts by counsel for each party to the litigation as controlling and determining the issues in favor of their respective clients, and the judges seem to have been rather nonplussed by the arguments made, and to have differed in their opinions equally with the counsel in their interpretation of the views expressed. The difficulty is contained in this passage:

"It remains only to consider the question arising out of that clause of the policy limiting

the time within which a suit or action against the company for the recovery of a claim arising out of its provisions may be sustained. While the validity of such a stipulation can not be disputed, *Riddlesbarger vs. Hartford Ins. Co.*, 7 Wall., 386, 389, we do not doubt that it may be waived by the company. And such waiver need not be in writing. It may arise from such a course of conduct upon its part as will equitably estop it from pleading the prescribed limitation in bar of a suit by the insured. It is to be observed that, by the terms of the policy, the company is not obliged to pay any claim until after the expiration of sixty days from the receipt of the proofs of loss at its office in Chicago, and the ascertainment of the loss in accordance with the terms of the policy. A suit, therefore, within the sixty days after the loss is so ascertained, would, upon the theory of the company, be of no avail to compel payment if it chose to plead the above clause in bar of the action. So that, practically, the assured is limited to ten months within which he may sue as of right. And yet the twelve months within which suit must be brought is made to commence at 'the date of the fire,' not from the date when the loss is payable. There are, it is said, adjudged cases that would authorize such a construction of this policy as would give the insured the whole term of twelve months from the date when he could demand, as of right, that his claim for loss be

satisfied. (*Vette vs. Clinton Fire Ins. Co.*, 30 Fed. Rep., 668; *Steen vs. Niagara Fire Ins. Co.*, 89 N. Y., 315, 322; *Spare vs. Home Mut. Ins. Co.*, 17. Fed. Rep., 568, 570; *Mayor, etc. vs. Hamilton Fire Ins. Co.*, 39 N. Y., 45, 48; *Hay vs. Star Fire Ins. Co.*, 77 N. Y., 235, 244; *Chandler vs. St. Paul Fire & Marine Ins. Co.*, 21 Minnesota, 85; May on Insurance, §479, notes, 2nd Ed). We waive, however, any expression of opinion, in the present attitude of the case, as to the view announced in those cases, for its disposition only requires us to hold, as we do, that the allegations of the amended bill, bearing upon this point, sustain the right of the plaintiff to bring this action, although it was not commenced until after the expiration of twelve months from the date of the fire. Those allegations are to the effect that the company, by its duly authorized agents, assured the plaintiff about thirty days after the fire and after the acceptance of the proofs of loss, that no question was made as to the loss or its payment, except that the company was considering the fact of the change in the receivership, and that it would undoubtedly pay the loss claimed; that as late as June 27th, 1884, the premium of three hundred dollars was paid to the company, which, by its agents, again assured the plaintiff that the loss would be paid as soon as action could be taken; that after sixty days had elapsed from the delivery of the proofs of loss, the company, by its agents, repeatedly gave the same assurances, and

that, by reason of such promises and assurancer, he neglected, for some time after sixty days from the delivery of proofs of loss, to bring suit for the recovery of the loss sustained. We need not stop to consider the suggestion that the agents referred to had no authority to give those assurances or to make those promises. No such question can arise upon the amended bill, for it alleges that the company, by its duly authorized agents, made the promises and gave the assurances. What the fact may be, in respect to the authority of the agents, or whether the plaintiff had the right to rely upon those assurances and promises, and, if he did, whether the company's rights were thereby affected, are questions not now to be decided. Their determination will depend upon the answer and the evidence at the trial. If, as the allegations of the amended bill imply, the failure of the plaintiff to sue within the time prescribed by the policy, computing the time from the date of the fire, was due to the conduct of the company, it can not avail itself of the limitation of twelve months. (*Curtis vs. Home Ins. Co.*, 1 Bissell, 484, 487; *Ide vs. Phœnix Ins. Co.*, 2 Bissell, 333; *Grant vs. Lexington Ins. Co.*, 5 Indiana, 23, 25; *Mickey vs. Burlington Ins. Co.*, 35 Iowa, 174, 180). In the case last cited it was properly said that it would be contrary to justice for the insurance company to hold out the hope of an amicable adjustment of the loss, and thus delay the action of the insured, and then be

permitted to plead this very delay, caused by its course of conduct, as a defense to the action when brought."

The contention advanced for the appellant is that the reference made by the Court to cases in which it is held that the insured has the whole period of twelve months after proofs of loss have been furnished in which to sue, is, in some sense, an implied approval of that doctrine; and that the phrase "some time" used above is the equivalent of *any time*, and that the Court mean to say that any delay caused or induced by the appellee, or its agents, great or little, operates as a waiver of the entire limitation.

On the other hand, the appellee points to the fact that the Court expressly refrain from any endorsement of the cases referred to; that the opinion is explicit in its declaration that the delay complained of must have covered so much of the twelve months as to prevent a suit being commenced within that period; and that the limitation commences to run "*from the date of the fire.*" Certainly if the natural force and significance of language is to prevail, this is the only rational construction to be placed upon the opinion. In our judgment what was said by the Court in the passage quoted above can be perfectly well harmonized by this course of reasoning, but not otherwise, viz.:

That it is more consistent with equity jurisprudence and with the principles of equitable relief to investigate causes upon their merits, than to dismiss them for objections taken to the pleadings which are not certainly and clearly dispositive of the controversy; that the allegations of this bill, though general, confessed as they were by the demurrer, were sufficient to call upon the court for an examination of the underlying facts of the case; that the matter was left entirely open for an investigation upon the merits, which might or might not develop ground for the claim of waiver sought to be enforced; that the starting point for the limitation period was *the date of the fire*, and that the suit should primarily have been commenced within twelve months thereafter; but that the bill contains an *implication* that the appellant was induced to refrain from suing within this period (which we understand is to be taken as the equivalent of the expression "some time") by the conduct of the appellee; and that if it should appear upon investigation that the appellant had been victimized by the appellee, to such an extent as to lose his rights, the Court indicated a readiness to grant him relief, but not so if he lost his cause of suit through his own laches. Thus interpreted, the decision is reasonable, logical and consistent, and, by the record, is a conclusive authority in our favor. On this theory it is in entire harmony with the decision of Judge Deady, and with

the views of Judge McKenna expressed in his dissenting opinion on the appeal; and the conclusions reached by the majority of the Court of Appeals are not in accord with it.

That Judge Deady so understood the opinion is manifest from the language of his decision in 47 Fed. Rep., 863, wherein he says: "The ruling of the Supreme Court in this case (136 U. S., 299) implies that if the conduct of the defendant prevented the plaintiff from bringing suit within twelve months from the date of the fire, it can not avail itself of such limitation." On the other hand Judge Hawley, while manifestly taking notice of the same language in the opinion of Justice Harlan, reaches the conclusion, in speaking for the majority of the Court of Appeals, that the limitation does *not* begin to run from the date of the fire.

But our position is impregnable apart from the decision of this Court, and we proceed to a general discussion of the question.

As stated above, the appellant advances two propositions, in our judgment alike untenable, viz.:

1. That the true construction of this policy gives the insured twelve months in which to bring suit, exclusive of the time required to prepare and submit proofs of loss and sixty days thereafter,—a clear period of twelve months.

2. That any conduct on the part of the insurer which is sufficient to justify the insured from pressing its claim during any portion of this time works a waiver of the entire restriction.

In support of their first point the learned counsel for appellant have cited quite an array of cases which it will be well to dispose of here. Before proceeding to analyze them, we wish to call attention to the difference in the language used in various policies to prescribe the limitation. In many of them it is stated as so many months from the time "the loss occurs," in others, "the loss accrues," in others, "the claim occurs," and in still others, "the claim accrues." In the policy under consideration the expression is **"the date of the fire."** This difference in language is held by the authorities to result in very diverse constructions of the different policies.

On pages 25-6 of appellant's brief there are thirty-two decisions cited as supporting his contention that the limitation clause of this policy did not begin to run until sixty days after proofs of loss were furnished. Of these, thirteen do not pass upon the point at all, viz.: *Ames vs. Ins. Co.*, 14 N. Y., 264; *Barnum vs. Ins. Co.*, 97 Id., 188; *Martin vs. Ins. Co.*, 44 N. J. L., 487; *Little vs. Ins. Co.*, 123 Mass., 380; *In re State Ins. Co.*, 16 Fed. Rep., 756; *Ide vs. Ins. Co.*, 2 Biss., 333; *Grant vs. Ins. Co.*, 5 Ind., 23; *McKay vs. Ins. Co.*, 35 Iowa, 174; *Longhurst vs. Ins. Co.*, 19 Id. 364;

Home Ins. Co, vs. Myer, 93 Ill., 271; *Andes Ins. Co. vs. Fish*, 71 Id., 620; *Peoria Ins. Co. vs. Whitehill*, 25 Id., 466 (incorrectly cited in appellant's brief); and *Black vs. Ins. Co.*, 31 Wis., 74. In nearly every one of these cases the decision was on the ground that there had been a complete waiver on the part of the insurer of the entire period of limitation, and in *not one* of them was any construction of the limitation clause offered, or any expression of opinion in regard thereto. In *Killips vs. Ins. Co.*, 28 Wis., 484, the decision was also placed on the ground of waiver, and while the court indicate that they inclined to the view contended for by the appellant here, if it were necessary, they content themselves with throwing out the suggestion as a simple *quaere*. In *Leach vs. Ins. Co.*, 58 N. H., 245, the court determine the case on the ground that the limitation in the policy under consideration was void because of another condition. In *Ins. Co. vs. Hall*, 12 Mich., 202, and *Westchester Ins. Co. vs. Dodge*, 44 Id., 420, the decisions, so far from aiding the appellant, are opposed to his contention and in our favor, and apparently *Bish vs. Hawkeye Ins. Co.*, 69 Iowa, 184, involving a clause similar to the one presented here, is to the same effect, though the decision is not clear. (But later cases in Iowa, not cited by appellant's counsel, support their contention upon policies using language similar to that found in the policy under discussion. See *McConnell vs. Iowa M. A.*

Ass'n, 79 Iowa, 757; *Matt vs. Same*, 81 Id., 135). So that of the thirty-two decisions cited by appellant, *eighteen*, or more than half, are not authorities in point, and some of them are opposed to his contention.

Now, with all deference to the learned counsel for appellant, for whom we entertain very high regard, we submit that it savors very much of trifling with the Court to erect this "dummy battery" to defend their position. Of course we do not mean to attribute their action to any improper purpose, but rather to the adoption of the citations of some careless commentator, which, as is well known, often fail to sustain a point attempted to be made. And it exhausts our patience to read in such decisions as are applicable that they are sustained by the "great weight" of authority, a bundle of such promiscuous cases as those given in appellant's brief being cited, and no notice taken of those which hold the opposite view. We think we shall be able to demonstrate that the decisions cited by appellant will not stand the test of analysis and criticism, while the preponderance of judicial opinion is quite on the other side.

Of the remaining fourteen cases cited by appellant, *Spare vs. Ins. Co.*, 17 Fed. Rep., 568, involved a policy using the phrase "loss occur," as was the case in *Vette vs. Ins. Co.*, 30 Id., 668. *Friezen vs. Ins. Co.*, Ib., 352, is based upon a policy

similar to the one under consideration in this case. We have the New York doctrine set forth in four cases, upon a different form of policy; *Mayor vs. Ins. Co.*, 39 N. Y., 45, the term employed being "loss accrue;" *Hay vs. Ins. Co.*, 77 Id., 243, the term being "loss occur;" *Arthur vs. Ins. Co.*, 78 Id., 462, the language being "claim accrue;" and *Mix vs. Ins. Co.*, 9 Hun, 397, the term being "loss occur;" the Iowa doctrine upon like policies in *Miller vs. Ins. Co.*, 70 Iowa, 704, the phrase being "after loss;" *Ellis vs. Ins. Co.*, 64 Id., 508, involving the term "loss occur;" the Minnesota view on a like policy, as set forth in *Chandler vs. Ins. Co.*, 21 Minn., 85, the language used being "claim occur;" the West Virginia view in *Barber vs. F. & M. Ins. Co.*, 16 W. Va., 658, in which the term "loss occurs" is presented, and *Murdock vs. Ins. Co.*, 33 W. Va., 407, upon a policy employing the term "date of loss," which is to be taken apparently as the equivalent of the term used here; the California construction in *Case vs. Ins. Co.*, 83 Cal. 473, upon a policy similar to the one in suit; and the Utah opinion, construing a like policy in *Hong Sling vs. Ins. Co.*, 30 Pac. Rep., 307.

When this formidable array of authorities is subjected to the test of inspection it is consequently seen that it is resolved into this: That upon policies *using different language* the appellant's contention is supported by the federal courts for the eastern district of Missouri and the district

of Oregon, and in the States of New York, Minnesota, Iowa and West Virginia, with a probable following in Wisconsin; and upon the language employed in this policy, apart from the case under discussion, the appellant has the support of the federal court in the western district of Wisconsin, the State courts of West Virginia and California, and that of the territory of Utah, to which we add the State court of Iowa.

In meeting the decisions cited by the appellant we shall present no greater number of authorities from each State than will serve to illustrate the established rule in that jurisdiction, not wishing to build a needless wall of cumulative decisions.

The conclusion reached in the federal courts above refered to and in New York, Minnesota, West Virginia, Iowa and Wisconsin (if it is to be counted) upon forms of policies differing from the one involved here, is dissented from

In Massachusetts:

Fullam vs. New York Union Ins. Co., 7 Gray, 61.

In Connecticut:

Chambers vs. Atlas Ins. Co., 51 Conn., 17.

In Illinois:

Johnson vs. Humboldt Ins. Co., 91 Ill., 93.

Allemania Ins. Co. vs. Little, 20 Ill. App., 431.

In Missouri:

Glass vs. Walker, 66 Mo., 32.

Bradley vs. Phœnix Ins. Co., 28 Mo. App., 7.

In Virginia:

Virginia F. & M. Ins. Co. vs. Wells, 83 Va., 736.

In Lousiana:

Blanks vs. Hibernia Ins. Co., 36 La. Ann., 599.

In North Dakota:

Travelers' Ins. Co. vs. California Ins. Co., 1 N. D., 151.

In Michigan:

Lentz vs. Teutonia Fire Ins. Co., 96 Mich., 445.

Upon policies in which is found a clause identical with or similar to the one under consideration here, the following support our contention:

King vs. Watertown Fire Ins. Co., 47 Hun, 1.

Schroeder vs. Keystone Ins. Co., 2 Phila., 286.

State Ins. Co. vs. Meesman, 2 Wash. (State), 459.

McElroy vs. Continental Ins. Co., 48 Kans., 200.

State Ins. Co. vs. Stoffels, Ib., 205.

In each of these cases the distinction was drawn between policies using the term "date of fire," and those in which are to be found the other expressions quoted above, and in each one of them it was clearly and positively decided that the limitation period began to run from the day on which the fire occurred. In addition to these decisions there is an unqualified dictum to the same effect in *Steen vs. Niagara Ins. Co.*, 89 N. Y., 315.

Such being the attitude of the authorities, let us subject them to an analysis and then apply the test of reason to the principles involved. We deny the soundness of the cases cited in appellant's brief, but we agree with his counsel wherein they say that the decisions on all sides of this question are wrong in undertaking to draw any distinction in meaning and effect between the various terms used in connection with insurance policies. We think they all amount to the same thing, and all ought to be held *to mean what they say*. Mark the weakness of the arguments set forth in the appellant's citations! The first class is

attempted to be justified on the ground that the policies contain *ambiguities* which must be resolved against the insurer. In the *Spare* case Judge Deady said: "The language of this policy is that of the defendant, and *any ambiguity* in its terms must be resolved against it." In *Vette vs. Ins. Co.*, 30 Fed. Rep., 668, it is said: "If, then, by comparing the stipulation with other provisions of the policy, *a doubt arises as to the time when the limitation begins to run*, that construction ought to be given (if it be a reasonable construction) which is most favorable to the assured, against whom it was intended to operate." In *Chandler vs. Ins. Co.*, 21 Minn., 85, the court say: "The expression 'claim shall occur,' obviously means claim shall 'arise' or 'accrue.' *No claim occurs or arises in favor of the assured upon the mere happening of the loss.*" In *Mayor vs. Ins. Co.*, 39 N. Y., 45, the court say: "In the preceding condition, when it is said that 'unless such suit or claim shall be commenced within the term of six months after any loss or damage shall accrue,' the words 'loss or damage' are not used with legal precision. 'Within six months after the right of action shall have accrued' *was, no doubt, what the parties intended.*" In *Hay vs. Star Fire Ins. Co.*, 77 N. Y., 235, it was said: "The loss should be deemed to occur when the company pays it, or is lawfully called upon to pay it. The loss then, and not until then, practically occurs *to it*." (The foregoing italics are all ours). And so it goes.

There are no ambiguities in these policies, but finding none the courts first raise them and then denounce them. In the decisions there is a spirit of doubt and uncertainty, a casting about without rudder or compass for some solid ground to which an anchor might be fastened, some judges seizing upon one thing and some another, lacking agreement between the various courts, and each in greater or less degree manifesting not the highest measure of satisfaction with their own work. The learned counsel for appellant have well characterized their own authorities in language which, if not distinguished for the grace and elegance of a Chesterfield, is sufficiently forcible for all practicable purposes, wherein they say, (brief, p. 31): "We undertake to say that not one man in a thousand would understand that his loss does not occur on the day when his house was consumed by fire. To say that the loss occurs after the insurance company gets through contending and quibbling about how much it will pay, appears to us unworthy the courts that have tried to wriggle around the limitation clause on that ground." "Wriggle,"—I thank thee, Jew, for teaching me that word. It expresses very aptly our view of the opinions to which it is applied.

But in contrast with the appellant's "wriggling" authorities, note the bold, clean-cut, argumentative and logical reasoning of those holding the adverse view.

In *Chambers vs. The Atlas Ins. Co.*, 51 Conn., 17, the limitation clause was "within the term of twelve months next after any loss or damage shall occur." The loss was payable sixty days after proof had been made.

The fire occurred September 1st, 1881; proof of loss was made September 14th; the action was commenced November 11th, 1882. The only question submitted to the court was as to whether the date of the fire or the expiration of sixty days from the furnishing of proofs of loss should be taken as determining the period of limitation. The court adopted the former in this language:

"This limitation is lawful and reasonable. In words in common use and of plain meaning an event is referred to as a starting point; that is, the destruction of, or injury to, the plaintiff's property by fire. It is certain that they intended to surrender a very large portion of the time allowed them by the law, and there is nothing either in the structure or the subject matter of the contract indicating their unwillingness to make the day of that occurrence the point of departure, and to agree that the period of twelve months therefrom should cover the making of the proofs, the sixty days of grace to the defendant and the institution of a suit.

"The contract keeps the day upon which a fire shall occur entirely distinct from the day upon

which the right to sue for indemnity accrues; each is described in plain and appropriate language. We find no reason for the assumption that when the first is mentioned the last is intended, and it is not for us, by construction, to give the plaintiffs what they failed to secure by agreement."

In *Johnson vs. Humboldt Ins. Co.*, 91 Ill., 93, the amount of damage was payable sixty days after proofs of loss, no action was maintainable until after award fixing the amount of the loss, "nor unless such suit or action shall be commenced within twelve months next after the loss shall occur." The fire occurred July 14th, 1874; proofs of loss were furnished July 21st, 1874; and the action was brought September 13th, 1875. It was held to be too late, the court saying: "It is, however, insisted the clause in the policy that the loss was to be paid sixty days after due notice and proof of the same should be made by the assured, and received at the office of the company, limits and controls the after-inserted condition prohibiting the bringing of an action more than twelve months after the loss should occur. We are unable to perceive that it controls this condition. If either has that effect, it would seem the latter controls the former. The two clauses considered together obviously provide that the company shall have sixty days within which to make payment, after notice and proof of loss, but in no

event should a suit or action be commenced after the expiration of twelve months from the date of the fire producing the loss. Any other meaning attached to the language, it seems to us, would be strained, unreasonable, and in direct violation of the intention of the parties clearly expressed."

In *Virginia Fire and Marine Insurance Co. vs. Wells*, 83 Va., 736, the limitation clause was "within six months next succeeding the day upon which the loss or damage is alleged to have taken place." The construction of this provision was the only question considered by the court, and it was very thoroughly examined. In the course of the opinion they say: "The contention of counsel for the defendant in error is, that the period of limitation does not commence until the right of action under the stipulation in the contract of insurance has accrued, and that as this could not have accrued before the twenty-fifth of August, 1884, sixty days after the fire, and the suit having been brought on the sixth of February, 1885, less than six months thereafter, the action was not barred by the limitation in the policy. And to sustain this insistence counsel rely on the further condition in the policy which postpones the loss or damage sustained for the period of sixty days after the receipt of proof thereof.

"It is undeniable that a policy must be construed in reference to all its provisions, like any

other contract. And it may not be gainsaid that the conditions of a policy should be construed, if possible, so as not to defeat the claim of the assured, which, in effecting the insurance, it was his purpose to secure. But there is no sounder rule of construction than that, when the terms and stipulations in a contract are plain and clear, we are bound to adhere to the terms as the only authentic expression of the intention of the parties. No one would be rash enough to claim that there is any obscurity or ambiguity in the language in which is expressed the prohibition to institute an action upon this policy after six months next succeeding the time when the loss is alleged to have taken place. The position is that the sixty days, during which the company is entitled to delay the payment of the loss incurred by the fire, should be eliminated from the six months. Had such been the intention of the parties, how easy it would have been so to have expressed that intention. But there is nothing in the policy, which is clear and unambiguous in all its terms, to indicate any such intention.

"It is within the experience of all men who have investigated the subject that insurances are, unfortunately, but too often the precursors of fires. Hence the sixty days were obviously stipulated for by the company for its own benefit, convenience and protection, so as to enable it to investigate the circumstances attending the fire by which the loss is alleged to have occurred,

and thereby satisfactorily to ascertain its liability and to determine upon its course,—whether, if there be no foul play, to rebuild or replace the destroyed property, or make good the loss in money, and possibly to provide the means of satisfying the demand of the insured, if it be honest, or, if not, to enable it to resist the claim.

"The privilege of postponing for sixty days the payment of the loss could not have been intended merely to abridge the period of limitation. * * * * * *

"The cases cited as authority for the position assumed by the counsel for the defendant in error are not appropriate to this case, the language of the provisions in the policies passed upon in those cases being different from the language of the provisions of the policy here under consideration. Besides, the decisions of the courts of several of the States sustain the construction contended for by the counsel for the plaintiff in error, and which the plain language of this policy obviously demands."

In *Travelers' Ins. Co. vs. California Ins. Co.*, 1 N. D., 151, there is a strong discussion of principles applicable to this case by Corliss, C. J., and his argument is so apt and convincing that we venture to quote from it at length. Upon the construction of limitation clauses he says:

"The defendants claim that the cause of action was destroyed by the lapse of time before the commencement of the action. The policy contains the usual limitation clause providing that no action shall be maintained upon the policy 'unless commenced within twelve months next after the loss shall have occurred,' and that the lapse of that time shall be taken as conclusive evidence against the validity of any claim under the policy. The loss occurred May 24th, 1885, and this action was not brought until March 24th, 1887. It is claimed by plaintiff, however, that proofs of loss were not furnished until April 1st, 1886, and that the twelve months' limitation did not commence to run before that date, and therefore the action was brought in time. This presents the question of the construction of such limitation clauses, which has often vexed the courts. It is undoubtedly true that a majority of the adjudications so interpret these limitations as to allow the full time to sue after the right of action has accrued, although more than the limited time has elapsed since the loss occurred. We can not assent to the doctrine of these cases. They rest upon the alleged necessity of harmonizing conflicting provisions. In these cases, as in this, the policies provided that the loss should not be payable until a specified number of days after the proofs of loss. There is no conflict between such a provision and another part of the same policy requiring the action to be

brought in twelve months, or any other time, after loss shall have occurred, provided, of course, a reasonable time is left after the cause of action has become perfect in which to sue. The error which appears to this court to lie at the foundation of these decisions is the assumption that the insurance company intended to give the insured the full time specified, during every moment of which he might institute his action. What right has any tribunal to find hidden somewhere in the contract a privilege to have the full time to sue after the cause of action has accrued, when the policy gives it only from the time the loss occurs? There are two distinct provisions,—one that the insured shall not sue before a certain time, and another that he shall not sue after a certain time. These do not clash. They merely necessitate the construction that the intention was to give the insured such period in which to maintain his action after he could sue as would be left after deducting from the time limited the time which must elapse before the right to sue could accrue. But we find in these cases this extraordinary reasoning: They assert that this doctrine will often kill the action before it could have life. The answer is short and simple. Every limitation in a contract is void which does not leave the plaintiff a reasonable time in which to sue after his right to sue has become perfect. When an insurance company has declared that a suit must be brought within forty days after a

loss has occurred, and that no action shall be maintained until thirty days after proof of loss, the duty of the court is not to interpolate into the contract a provision that the limitation runs from the date the cause of action accrues in place of one expunged by the same process,—to-wit: the provision that the time runs from the time the loss occurs, which is the date of the fire; but the court should invoke against the company the rule that a right of action shall not, in effect, be destroyed by a limitation which leaves the plaintiff an unreasonably short time to sue after his cause of action has accrued, and declare the limitation clause void. If other provisions of the policy make it appear that in every case a reasonable time will not be left after the right to sue has become perfect, the limitation is void. If, acting in good faith, and with all proper diligence, it transpires in any particular case that other provisions of the policy to be complied with as conditions precedent to a right of action could not be performed in time to leave a reasonable time thereafter in which to sue, the limitation is inoperative in such a case; and, if the company has induced the insured to believe that the loss will be paid, or that the limitation will not be insisted on, until it is too late to sue, the limitation is waived. Thus, the insured is fully protected by the application of known and established principles. The contract is construed as it is written, and the time when the limitations begin to run, if at all, is fixed, and not uncertain."

Can there be hesitation for a moment between the views expressed on the different sides of this question?

Wearied, perhaps, and confused with these inconsistent decisions, the insurance companies began to adopt a more explicit form of policy, and seemingly the courts which had encountered such difficulties from the ambiguities which they conceived to exist in the other forms might have responded, "*Cessante ratione, cessat et ipsa lex;*" but not so.

It is true, *that there is no case undertaking to contrast or consider the term "date of fire" in connection with those of "loss occur" or "claim accrue," in which a distinction is not drawn and the first mentioned term given its natural sense and influence*, but in six cases,—*Freizen vs. Allemania Ins. Co.*, 30 Fed. Rep., 352; *Case vs. Sun Ins. Co.*, 83 Cal., 473; *Murdock vs. Franklin Ins Co.*, 33 W. Va., 407; *Hong Sling vs. Ins. Co.*, 33 Pac. Rep., 307, and the Iowa cases we have introduced,—it is held that the limitation clause commencing by its terms with the "date of the fire," or equivalent expressions, does not in reality take effect until the time when an action may actually be brought. They cite the other class of cases in support of the views announced, without drawing any distinction between the differences in phraseology, they enter into no analysis of the term they construe, and thereby do not even save to themselves

the plea of solving ambiguities. We have already said that no distinction can properly be taken between the different terms employed in these policies, but, rightly or wrongly, they have been drawn; and whatever extenuation there may be for the constructions which have been placed upon the old forms of policy, there can be no justification for the violence done the new form. The line has been clearly drawn even by courts which have applied the liberal construction to the old form. In distinguishing this case from the *Spare* case, Judge Deady said (11 Saw., 276):

"Unlike the stipulation in *Spare vs. Home Mut. Ins. Co.*, in which the right to sue was limited to one year from the time the loss 'occurred,' which, in conjunction with the sixty days also allowed the company to ascertain whether any loss had 'occurred,' and make payment thereof, was held to mean one year from the expiration of said sixty days, the limitation in this case is a year from a day certain, to-wit, the day of the fire. And unless the assured is prevented by the action or non-action of the company in the matter of ascertaining the amount of the loss from commencing an action within that time, he must do so or he will be barred therefrom."

And in his final decision of this case, contrasting the term found here with that used in the *Spare* case, Judge Deady said:

"This construction of the phrase naturally led the insurance companies to the use of language in naming the date or event from which the limitations should commence which would not admit of doubt as to its meaning: 'Twelve months next after the date of the fire from which the loss shall occur' was substituted for 'twelve months next after the loss shall occur.'" (Record, p. 36).

In this connection we will present the exceedingly clear and terse dissenting opinion of McKenna, J., delivered in the Court of Appeals (record, p. 65):

"The provisions of the policy are as follows:

"It is expressly provided and mutually agreed that no suit or action * * * shall be sustainable * * * unless such suit or action shall be commenced within twelve months next after the date of the fire from which such loss shall occur. * * *

"This provision would seem to need no interpretation in other words than its own. It is so clear and direct as to baffle attempts to make it more so.

"I know of no way to express concrete time except by commencing at a certain date or event, —and the latter because it indicates a date,— and running a certain duration after, or to a date or

event after. The duration or the interval marks the period, not only as to length, but especially as to time before and time after, distinguishing it, therefore, and establishing it, the period commencing at the initial date or event and immovable from it. This is important. The provision of the policy, therefore, is not twelve months to bring a suit only, but twelve months within which to bring a suit and to do other things; not twelve months to sue after all conditions precedent have been removed or performed, but twelve months within which to remove or perform all conditions precedent and to bring a suit. Substantially different things; as different as a period commencing at one date is different from a period commencing at another date; as different as the year 1891 is from the year 1892. I do not think the rights of either party to the policy are subserved by confounding these differences.

"Limitations of time of bringing suit on policies are sustained by authority, but with the qualification that they must be reasonable.

"If the conditions of the policy, therefore, can not be performed within the period stated and a proper time be left for bringing suit, the limitations would be unreasonable. If they should be used to delay or mislead, they would be held to be suspended or waived, as was announced by the Supreme Court in this case on a former appeal. (136 U. S., 299).

"If the parties did intend to 'expressly provide and mutually agree' to limit the right of suit within a particular period commencing at the fire,—an unambiguous and impressive incident,—how else could they so aptly and adequately express than they did? How otherwise could they have so bounded and identified the period if they meant a fixed period, not a movable period? 'Twelve months next after the fire,' is unambiguous. This is conceded by my associates, but its certainty is made to yield to other provisions of the policy not more certain, and which are entirely for the benefit of the defendant company. If the policy is to be construed most strongly against the insurer, why not put it the other way and make the other provisions yield to the provision for suit, and as the company has stipulated that the insured shall have 'twelve months next after the fire' to bring suit, say that he shall have the whole of them and all provisions suspending or lessening them shall be void? This way is as good as the other, and both bad, because neither accommodates the full purpose of the parties as I conceive it, which is that the insurer shall have time to investigate a claim,—arbitrate it may be,—and the insured shall have a reasonable time to sue. Any policy that does not secure the latter would, as we have seen, be declared unreasonable; once secured, it can not be embarrassed by the acts of the insurer. This, we have also seen, was declared by the Supreme Court in this case.

"Did the defendant company waive the provision requiring suit to be brought twelve months next after the fire? I do not think the allegations of the complaint that the plaintiff failed to sue by reason of the conduct of the company is [are] sustained by the evidence. See Thompson's testimony, pages 89 to 94, inclusive, of the record."

And it seems to us that the views of other courts are worth setting forth at some length.

In *Steen vs. Niagara Fire Ins. Co.*, 89 N. Y., 315, while the court decided that upon the policy under consideration the period of limitation ran from the date the right of action accrued, they said: "No doubt the appellant could have stipulated that the time of the fire should be looked to as the event from the happening of which the limitation should run, but it would require distinct language to show that such was the intention of the parties. It is not used here. It is found in *Schroeder vs. Keystone Ins. Co.*, 2 Phil., 286, one of the cases cited by the appellant."

Following this case came that of *King vs. Watertown Fire Ins. Co.*, 47 Hun, 1, in which the limitation clause was "within twelve months next after the fire shall have occurred." The court say: "In the case of *Steen vs. Niagara Fire Ins.*

Company (supra), the policy contained a similar condition, except that it provided that the suit or action shall be commenced within twelve months next after such *loss or damage shall have occurred.* In that case it was held that the words 'after such loss or damage shall have occurred' did not limit it to the time of the fire; but Danforth, J., in delivering the opinion of the court, says: 'No doubt the appellant could have stipulated that the time of the fire should be looked to as the event from the happening of which the limitation should run. But it would require distinct language to show that such was the intention of the parties. It is not used here. It is found in *Schroeder vs. Keystone Insurance Co.*, 2 Phil., 286.' In that case the provision was that 'no suit or action at law or in equity shall be maintainable against the company upon or by virtue of this policy, unless the same shall be brought within six months from the time of the loss or damage by fire, and after the expiration of six months from *such fire* such lapse of time shall be conclusive evidence against the validity of any claim under this policy.' So that, whilst the words 'after such loss or damage shall have occurred' are not sufficient to limit the time to that of the fire, the words quoted from *Schroeder vs. Keystone Insurance Company* are sufficient. In the case under consideration the words are even more explicit. They are, as we have seen, that the suit or action shall be commenced within twelve

months *next after the fire shall have occurred.* We can conceive of no words that would make it any more definite or certain, and consequently must agree with the referee that the year commenced to run from the date of the fire."

In *Schroeder vs. Keystone Ins. Co.*, 2 Phil., 286, the policy provided "that no suit or action at law or in equity shall be maintainable against the company, upon or by virtue of this policy, unless the same shall be brought within six months from the time of the loss or damage by fire; and after the expiration of six months from such fire, such lapse of time shall be conclusive evidence against the validity of any claim under this policy." It was held that the period of limitation commenced to run from the day of the fire.

State Ins. Co. vs. Meesman, 2 Wash. (State), 459, is immediately in point. The provisions of the policy were similar to those found here, except that the limitation was six months. One judge dissented, but the views of the majority of the court were expressed by Anders, C. J., a a very learned and able jurist, so tersely and with such direct application to the questions involved here that we refer to the whole opinion without detracting from its force by extracts.

In *McElroy vs. Continental Ins. Co.*, 48 Kans., 200, it is said:

"But in considering the cases cited, a proper discrimination must always be observed between those policies that read 'after the loss,' 'from the loss,' 'from the time the loss occurs,' and this policy that reads 'within twelve months after the fire shall have occurred.'"

And in *State Ins. Co. vs. Stoffels*, Ib., 205, the court say:

"The language of the limitation clause is not ambiguous, but is so definite and distinct as to admit of no construction save a literal one. It says no action shall be sustained unless commenced within the term of six months next after the fire shall have occurred. * * * This language of the policy sued on differs from the language of those policies in which the limitation takes effect from the time when the 'action accrues,' or the 'loss accrues,' or which use some other more general and less definite language which must be construed by the courts. The language in this policy needs no construction, and, in fact, admits of none."

We pass here from the direct discussion of these authorities to a more general consideration of the principles surrounding the point before us.

The fundamental error in all the authorities opposing the view for which we contend lies in

assuming that the provision that an action cannot be commenced *after* a given period is synonymous with a declaration that the path shall be clear for an action during the whole of the period referred to,—that an agreement not to sue after twelve months from a loss, for example, is equivalent to saying that there shall be twelve entire months during any part of which a suit may be brought, regardless of its connection with the date of the loss. This is a misapprehension and misstatement of the case without justification. Assuming to give effect to the several provisions of the policy by construing it as a whole, the courts completely nullify one of them and do exactly what they profess to be seeking to avoid. A safe and sound rule was early laid down by this Court, wherein it was said *(Green vs. Biddle,* 8 Wheat., 1, 89): "We pass over the other observations of counsel upon the construction of this article, with the following remark: That where the words of a law, treaty or contract have a plain and obvious meaning, all construction in hostility with such meaning, is excluded. This is a maxim of law and a dictate of common sense; for were a different rule to be admitted, no man, however cautious and intelligent, could safely estimate the extent of his engagements, or rest on his own understanding of a law, until a judicial construction of those instruments had been obtained." Vattel, too, says very epigrammatically, "It is not permitted to interpret what has no need of interpretation."

The Oregon statute is simply a declaration of principles applicable to such cases, and is couched in such felicitous language that we venture to assert it as a part of our argument:

"In the construction of a statute or instrument, the office of the judge is simply to ascertain and declare what is, in terms or in substance, contained therein, not to insert what has been omitted, or to omit what has been inserted; and where there are several provisions or particulars, such construction is, if possible, to be adopted as will give effect to all." Hill's Ann. Laws of Oregon, Vol. 1, § 694.

In *Healey vs. Imperial Fire Ins. Co.*, 5 Nev., 268, it was held that, "In the construction of policies of insurance there is but one safe rule, and that is, to take the contract as written; subtracting nothing therefrom and adding nothing thereto; there is no substantial compliance with its terms, except an exact compliance."

Now, how does it comport with these declarations and principles for a court, on the plea of giving effect to *all* the provisions of these policies, to absolutely annihilate one of the most important of them, or to say in a case where no complaint is made of the language used in a policy, no reformation sought: "In the preceding condition, when it is said that unless such suit or

claim shall be commenced within the term of six months after any loss or damage shall accrue, the words 'loss or damage' are not used with legal precision. 'Within six months after the right of action shall have accrued,' *was, no doubt, what the parties intended*" (39 N. Y., 45); or, "The loss should be deemed to occur when the company pays it, or is lawfully called upon to pay it. The loss then, and not until then, practically occurs *to it*." (77 N. Y., 235). These contracts are clear and unambiguous, each provision is distinct, free from conflict with the other and enforceable; as said in 51 Conn., 17, "each is described in plain and appropriate language," and, as the supreme court of Illinois point out in 91 Ill., 93, "any other meaning attached to the language would be strained, unreasonable, and in direct violation of the plain intention of the parties, clearly expressed."

We have said that the authorities against which we contend set aside the contracts the parties have entered into; they in fact do more, for they undertake to substitute others in their stead. This is beyond their power. If these stipulations are unconscionable, against public policy, or even made under duress, as counsel for appellant suggest, the Court may, upon a proper showing, set them aside and throw the parties upon the limitations prescribed by statute, but here their authority ends. When they assume to go farther, and not only to nullify

one contract but to set up another in its stead, the insurer may well respond, "*Non haec in foedera veni.*"

None of the objections made on the other side hold good. These limitations are not only firmly supported in law, but their policy has been explicitly commended,— Field, J., in *Davidson vs. Phœnix Ins. Co.*, 4 Saw., 594. Much shorter periods than that prescribed in the policy under consideration have been sustained. Here there was approximately ten months, and in almost any conceivable case, unless extraneous considerations intervened, a clear period of time exceeding six months. This is reasonable and sufficient, and can there be any sound objection on the score that it commences to run sixty days, or ninety days, or even six months, after the fire, so long as the time is actually secured? All the insured is entitled to under his contract is a reasonable time, and this he gets whether it be counted from one date or another.

The learned counsel for the appellant seek to invoke the rule touching the construction of conflicting provisions in matters of statutory limitations, but, this being a matter of contract, there is no legal analogy between the cases (*Riddlesbarger vs. Hartford Ins. Co.*, 7 Wall., 386; *Wilkinson vs. Ins. Co.*, 9 Hun, 522, affirmed in 72 N. Y., 499), and there being nothing unjust or inequitable about the limitation clause in this policy, there is

no reason why the argument made in those instances should apply.

We do not make war upon the object sought to be attained by many of the adjudications which we have criticized and condemned. They have endeavored to save to the insured a right of action which would otherwise have been lost without his default, or to overcome the hardships of special cases by the commendable desire of saving parties from loss which would result from the misconduct of insurers. They have reached the right goal, but have traveled a mistaken route. When a case of hardship can be excepted from a general rule upon its peculiar facts it is well enough, but it is dangerous and harmful to bend general principles to answer the exigencies of special cases. See how this observation is illustrated in *Case vs. Sun Ins. Co.*, 83 Cal., 473. It appeared there that the time necessarily consumed in making proofs of loss, etc., overran the entire limitation period, and in order to relieve the insured from this result the court evidently thought they were compelled to place their decision upon the ground they announce, thereby running into conflict with a previous decision, apologizing for it, undertaking to distinguish it, and leaving the matter in an unsatisfactory state. Now, why do an unnecessary and wild thing when the same end was susceptible of accomplishment by a simple and direct proceeding? Instead of throwing the whole state of the law upon this subject into confusion, how

easy it was to have simply said that a waiver of the condition resulted in this case by reason of the insufficiency of the prescribed time to allow of compliance with all the provisions of the policy!

Killips vs. The Putnam Fire Ins. Co., 28 Wis., 472, is a case much relied upon by appellant's counsel, and a modified application of what is said there commands our full endorsement. In the passage referred to the court say:

"It does not seem to require much argument to demonstrate that if, by any act or omission of the responsible officers and agents of the defendant, the plaintiff should be induced to suspend action in the premises, for a given time, such time should not be deemed a part of the twelve months to which his right of action is limited by the original contract. To hold otherwise would be in many cases to allow a person to take advantage of his own wrong. Cases may readily be supposed, where, by delays in passing upon the sufficiency of proofs of loss, in investigating losses, or in replying to communications, by general objections to proofs, refusing to specify wherein they are defective, and thus compelling the claimant to grope his way in the dark, and find out as best he may wherein he has come short of fulfilling the requirements of his policy,—and by many other means, the agents and officers of an insurance company might, without committing any act which the law would adjudge fraudulent, so em-

barrass the claimant that he would be entirely unable to make satisfactory proofs of his loss within the time which his contract gives him for that purpose, and yet be entirely free from any laches whatever. The idea that the remedy on the policy may be lost under such circumstances, is not to be entertained for a moment. The plainest principles of justice demand that the time thus lost by the plaintiff without any fault on his part, but through the fault of the defendant, should be added to the time within which they contracted in the first instance that the action should be commenced, and the plaintiff be not barred of his remedy on the policy until such additional time has expired."

The qualification we would impose is, that it will be time enough to apply the principle here enunciated when a case is presented which calls for such application. The matters of original construction and waiver are separate and distinct, and no good end is attained by confounding them. An insurance company having the right, as has been seen, to limit by contract the time within which it may be sued, is not in point of law restricted as to the period of limitation beyond the requirement which the law will enforce in the face of any contract stipulation, that the assured must have a *reasonable* time in which to enforce his rights. The law will not allow him to be deprived of all right of redress, but he has no

claim upon any specific number of years, months or days, unless it is given him by statute or reserved in his contract. Policies that have come under our notice have contained restrictions to twelve, six, and even four months. The provisions have all been upheld as equally within the power of the company imposing the restrictions, and there is no more reason as an abstract proposition for a party being allowed one period rather than another, so long as he has ample opportunity, under whatever limitation may be prescribed, for commencing a suit to recover for a loss sustained. Nor can we see why this "reasonable" time may not be made to run from a back date; the date of the fire is a fixed and generally well-ascertained point of time. When it is found by a case presented that the action of the company, or a compliance with all the different stipulations of the policy, do not leave remaining a reasonable time in which to institute a suit, the limitation may be deemed in law to be waived; but primarily it is to stand and be read in the natural sense of the words which the contracting parties have adopted as expressing the import of the agreement into which they have entered.

The authorities cited in appellant's brief are sufficient to indicate very clearly that both courts and juries are disposed to give the insured the benefit of every doubt, and that his rights will be protected in all cases where he exhibits anything like good faith and reasonable diligence. Beyond

this the courts ought not to go. The case should not be placed entirely in the hands of the insured, regardless of all the contractual rights of the insurer. As the insured is the creditor, it is unquestionably true that, as a general proposition, he will be found pressing his claim and the debtor often delaying him; but cases may arise, and undoubtedly do arise, in which the insured has an object to accomplish by delay, and it would be unjust to destroy all the rights of the insurer by saying that the insured might be as dilatory as he saw fit in preparing his proofs of loss and presenting his claim, in failing to expedite the matter in many ways, as suggested by the Wisconsin court in alluding to the insurer, which would not be visited with legal condemnation and punishment, and then, when valuable evidence had, perhaps, been thus lost, claim six months or twelve months after he had submitted his proofs, really at his own convenience, in which to commence his action.

Beyond all question it is a wiser, sounder and more wholesome doctrine for the courts to say these policies mean what they profess, that both parties are to be held to a strict compliance with their provisions, but that the insurer shall not profit by any obstacle thrown in the way of, or any injury done to, the insured. And it must also be borne in mind that the insured is not always innocent nor the insurer always wicked. Indeed, there is perhaps no branch of business

in which so much sympathy is claimed for the insured, so much vituperation heaped upon the insurer, and at the same time such unconscionable frauds perpetrated upon the insurer. With no inconsiderable percentage of the world's population it is considered as legitimate to swindle an insurance company as it is to sell a pair of pantaloons.

In case the Court decide in our favor the point which has so far been considered, we will be brought to the question as to whether or not the appellee by its conduct waived the limitation, or any part of it. Indeed, from the bill it would seem that this is the ground of contest. The fire occurring May 19th, 1884, and the loss not being payable until sixty days after proofs had been furnished, if the limitation is held to run from that date, it necessarily could not commence earlier than July 18th, 1884, and would not end until July 18th, 1885, while the action was begun July 10th, 1885. If the appellant's contention as to the commencement of this limitation period is sound, therefore, his suit was brought in time, and there is no occasion for discussing the matter of a waiver; but the fact that the burden of the bill is so largely thrown upon the latter ground would seem to show that the first was at least not considered a safe reliance.

It is suggested in appellant's brief that this Court should not review the determination of the

Court of Appeals on this question of fact; but the statute prescribes, and the rulings of this Court hold, that the entire case is here for review, as if it had been brought by appeal, instead of upon the writ of certiorari.

See Act of March 3rd, 1891, Sec. 6.

Lau Ow Bew, Petitioner, 141 U. S., 583.

Counsel for appellant say, in support of this issue, that if our construction of the policy in suit be conceded to be the correct one, the appellee is estopped from insisting upon it for the reason that by its conduct it delayed the earlier institution of the suit, and consequently it will be held to have waived the limitation, either as a whole, or at least to the extent of sufficient time to compensate for the time lost by the delay. This involves a consideration of the evidence and of appropriate legal principles as applied to the facts disclosed by the record.

The only evidence bearing upon this matter is the testimony of Thompson, the receiver, and we give here its material parts (record, pp. 46-9):

"Q. Did this policy of insurance that was issued by the Phenix Insurance Company upon the Clarendon hotel property come into your hands as receiver?

"A. It did.

"Q. Who delivered it to you?

"A. E. S. Kearney, my predecessor, delivered it with other papers.

"Q. Who paid the premium on the policy to the company?

"A. I paid it after I became receiver.

"Q. (CROSS) Was it before or after the fire?

"A. It was after the fire.

(Defendant moves to strike out the witness's answer as to the payment of the premium, on the ground that it is immaterial).

"Q. How did you come to pay the premium? Was there anything said to you about it by the company or its agents?

"A. The agent stated to me that the premium had not been paid; that it would facilitate settlement; that it was necessary that it should be paid before the settlement, and I paid it.

"Q. State if you, at any time after you became receiver, expressed any determination to bring a suit against the company, or threatened to bring a suit against the company.

"A. I did, if the policy was not paid.

"Q. Was there anything said to you at the time by the agents here of the company about settling for the loss at or after the time you threatened to bring a suit against the company?

"A. The agent offered to settle for one-half of the loss rather than have any suit about it,— to pay one-half,— which I refused to accept.

"Q. Was there anything said by the agent to you with reference to the probabilities of a settlement by the company if a suit was not brought?

"A. *The agent told me he thought the company would pay the amount. He thought they would,* **but he was not authorized to say.** *He thought they would pay it and advised me not to bring suit; it would complicate matters somewhat, and he thought I had better not do it; urged on me not to do it.*

"Q. Was that after you had paid the premium, or can you give the date of that conversation or of any such conversation you had with him?

"A. It was very soon after the sixty days expired within which I had to do it, but I can not give the date or time. I have no data, and it has been a good many years since.

"Q. Did you delay bringing a suit in consequence of those statements made to you by the agent?

"A. **I can not now say; I do not remember.**

"Q. Can you state when it was that you were first informed that the company would not pay this loss?

"A. I can not give the date, but it was after the sixty days had expired in which to make the proofs, but I can not give the time.

"Q. Do you know who the agent was that was acting here at that time? Who took the premium from you?

"A. No; I can not give his name.

"Q. Did he know that you were the receiver in the case of *Holladay vs. Holladay?*

"A. Oh, yes; he was treating with me as receiver."

CROSS-EXAMINATION.

"Q. You say that you were notified that the company declined to pay this loss very shortly after the expiration of the sixty days from the time the loss occurred?

"A. Well, I say soon after that; I can not give the date or the time.

"Q. But it was a short time?

"A. Yes; it was not long after.

"Q. And after receiving that notice you relied no further upon any expectation that the company would pay voluntarily?

"A. *No. They promised to refer the matter to the home office, and they were some time, as a matter of course, getting their answers from there;* but I can not give the length of time that they required.

"Q. What is your best judgment now as to the time when you gave up any hope of negotiating with the company for a voluntary settlement?

"A. I can not give that time; it may have been one month, it may have been two, it may have been three months.

"Q. From the date of the loss, you mean?

"A. No; from the date of the sixty days.

"Q. Do you recollect having a talk with Mr. Brown, of Brown, Craig & Co., of San Francisco, in regard to the matter?

"A. Yes, sir.

"Q. Was it from him you got this understanding?

"A. That I can not say, whether it was from him or the local agent here; *but the local agent assured me that he would send all the facts to the head office, and I can not say whether that was in the east or at San Francisco, but he would send all the facts to the office to which he was responsible and would give me their answer when he received it*, **which he did.**

"Q. Brown did notify you that the company would not pay the loss, did he not, in this conversation?

"A. *I believe he did; that is my recollection.*"

Can such evidence as this support the claim that is predicated upon it?

Mr. Bigelow says in reference to the necessary elements of an estoppel (Bigelow on Estoppel, 484): "The cases when carefully analyzed show that all of the following elements must actually or presumably be present in order to an estoppel by conduct:

"1. There must have been a false representation or a concealment of *material* facts.

"2. The representation must have been made with *knowledge* of the facts.

"3. The party to whom it was made must have been *ignorant* of the truth of the matter.

"4. It must have been made with the *intention* that the other party should act upon it.

"5. The other party must have been *induced* to act upon it."

A further essential incident is, that the conduct of one party relied on by another, from which an estoppel is claimed, must be sufficient to warrant the course of the other, acting as a reasonable man.

Bloomfield vs. Charter Oak Bank, 121 U. S., 121.

Hurt vs. Riffle, 11 Fed. Rep., 790.

The only ground of estoppel that can be invoked upon the point as to the limitation of the right to sue, is that of false representations made by agents of the appellee. It is essential that these representations should have been made with a fraudulent intent, or that it would amount to a fraud to allow the appellee to avail itself of any advantage gained thereby, and they must have been statements of fact, or their equivalent. There can be no pretense that any such purpose existed on behalf of the local agents in Portland, or that any such result can follow. What passed between them and Thompson was, a demand for the payment of the premium, with a statement that it would facilitate a settlement, and that it was necessary to pay the premium before settlement could be made; a threat by Thompson to bring suit and an offer to pay half the loss, which was immediately rejected; an unauthorized expression of opinion that the loss would be paid, advice not to sue, etc. The payment of the premium was made before suit could have been instituted in any event, and no delay could have been occasioned thereby, while the other matters occurred "very soon" after the earliest date when an action might have been instituted. All that appears in regard to any communication with the appellee's general agent, is, that he notified Thompson that the appellee would not pay the loss, and this appears to have been not later than August 31st, 1884.

No possible claim Thompson could have made as to his course having been influenced by the action of these agents could prevail, for it was not sufficient in point of law to have justified his delay. It, of course, devolved upon the appellant to establish this defense by affirmative evidence, and he has wholly failed to do it. We can not express our views better than to quote from a charge of Judge Drummond in *Curtis vs. Home Insurance Co.*, 1 Biss., 484: "But it is absolutely necessary that the party should show that by the action of the insurance company itself, he has been prevented from bringing suit within the time prescribed; in other words, he, as a reasonable person, must be convinced that it was unnecessary for him to bring suit because the company was acting as if it would pay for the loss. If the conduct of the company is such, and the negotiations or communications between the parties are of such a character as to convince a reasonable person that the company will not pay for the loss, then it is the duty of the party who has sustained the loss to bring the action within the time limited."

How could the facts, as testified to by Thompson, justify a reasonable person in the course he pursued? Upon the only point which could have misled him,— that of the agent urging him not to sue, in the hope of effecting a settlement,— what was said to him was clearly an expresson of the agent's personal opinion only, and Thompson

was explicitly told by the agent that he was not authorized to speak for the company. Would not a "reasonable" man at once have set about to procure an assurance from some one who could speak by authority, or have governed himself according to his existing contract?

In May on Insurance, 3rd Ed., §485, the author says: "Nor will the operation of such a limitation be suspended or prevented by negotiations for a settlement, as by a reference pending between the parties, if there be no agreement for delay, and the defendant has done nothing to mislead the plaintiff."

The case of *McFarland vs. Peabody Ins. Co*, 6 W. Va., 425, is directly in point, and to the same effect is *Waynesboro Mutual Fire Ins. Co. vs. Conover*, 98 Penn. St., 384. See also *Gooden vs. Amoskeag Fire Ins. Co.*, 20 N. H., 73.

But how can it be claimed that there was any cause for delay, excusable or inexcusable, when in answer to the very suggestive question, "Did you delay bringing a suit in consequence of those statements made to you by the agent?" Thompson says, "I can not now say; I do not remember."

Judge Deady, in reviewing the case, very aptly says: "Of course, in the face of these facts, there could not be any truth in the allega-

tions of the amended bill as to the cause of the delay in bringing this suit.

"The statements in the bill on this subject, which are denied by the answer, seem to have been the work of the attorney, which the receiver in his testimony utterly fails to support." (Record, p. 35).

It is as clear as anything can be that the appellant has suffered a complete failure of proof in this case. It matters not whether he claims to be relieved of the entire effect of the limitation clause or only seeks compensation for the time he alleges was lost in negotiations between the receiver and the agents of the appellee; the result must be one and the same, though some difference in our course of reasoning will arise.

Assuming that Thompson was unjustifiably subjected to some delay by appellee, it does not help the appellant's case one whit. As we have suggested, this entire matter of waiver can only be considered as a factor in the case upon our theory of the construction of the limitation clause, and if the claim is admitted at all it will certainly be only to the extent of allowing the appellant *compensation for time actually lost.* Counsel for appellant lay hold upon the expression "some time" used in this connection by Justice Harlan as upon the horns of the altar of their hopes. We hardly know how far they

will claim these words reach, but compensation is manifestly the idea which runs all through the adjudications in which the matter of delay has been a subject of consideration, and we can not think that this Court proposed to go further. Let us see how the claim will result in this case. Appellant's counsel say in their brief (p. 50): "It has never been pretended by anybody, at any time, that the delay extended beyond the twenty-seventh day of August [1884]," and they are no doubt prepared to stand by this statement. At any rate, it is pleaded in the answer (record, p. 27) that a general agent of appellee informed Thompson on August 31st, 1884, that appellee denied *all liability* upon the policy and refused to pay the loss, and there is nothing in the case contravening this statement.

Now, then, assuming that Thompson submitted his proofs of loss the day succeeding the fire (May 20th) and that he got his formal answer from appellee August 31st, which is giving him all the latitude of which the case is capable, this result follows: That he could not have brought suit earlier than July 20th, and the delay complained of certainly not extending beyond August 31st, he may be said to have lost forty-two days, for which he may claim compensation, but his twelve months expiring May 19th, 1885, and his suit not being commenced until July 10th, following, he overran his time *fifty-two* days, and, if full compensation is allowed, there

is still a hopeless default of ten days. So the appellant loses this point by an absolute mathematical demonstration.

But why should any allowance be made when Thompson had a superabundance of time left in which to sue after August? Judge Deady well said in rendering his final decree: "If the conduct of the defendant only prevented this suit from being brought for five months after the date of the fire, it is only a waiver of so much of the limitation.

"The question then is, did there remain of the limitation a reasonable time within which to bring this suit? and this admits of but one answer. The time (seven months) was ample. Indeed, under the circumstances, one month was sufficient." (Record, p. 34.)

Counsel for appellant are disposed to be rather severe in their comments upon this passage of Judge Deady's opinion, as if he were introducing some novel and untenable doctrine; but we answer that, in the first place, it is common sense, and in the second place it is well supported by authority. Assume that some delay has taken place; it is *damnum absque injuria*, if there is an abundance of time left for the ready enforcement of the rights of the insured.

Two cases are cited in appellant's brief in support of their contention, the first being *Killips*

vs. Putnam Fire Ins. Co., 28 Wis., 483, and the other *Andes Ins. Co. vs. Fish*, 71 Ill., 620. We have already sufficiently considered the first, and will dismiss the second by saying that it is not shown in the opinion at what stage of the period of limitation the negotiations set up took place, but all the court say about the matter is this: "Appellee swears that he forbore bringing suit, at the instance of appellant's agent, for some two or three months whilst he was endeavoring to have his claim amicably adjusted. This is not contradicted by any witness for appellant, and it furnished a sufficient excuse for not bringing suit *pending the attempted negotiations*." No one will take issue with this statement.

On the other hand we beg leave to *again* call the attention of appellant's counsel to the following decisions in which loss of time was not allowed, when there remained a reasonable period thereafter for bringing suit:

Ripley vs. Ætna Ins. Co., 30 N. Y., 136, where four months of twelve were consumed in negotiations.

Blanks vs. Hibernia Ins. Co., 36 La. Ann., 599, where *four* months of *six* had been lost.

Garretson vs. Hawkeye Ins, Co., 65 Iowa, 468, where the first month of six was lost.

McFarland vs. Peabody Ins. Co., 6 W. Va., 432, where *five* months of *six* were lost.

State Ins. Co. vs. Meesman, 2 Wash. (State), 459, where two weeks were lost at the beginning of the term and the action was begun three days after its expiration.

Travelers' Ins. Co. vs. California Ins. Co., 1 N. D., 151, where seven months of twelve were lost.

Garido vs. Ins. Co. (Cal.), 8 Pac. Rep., 512, where all the time except *twenty-five days* had been lost.

Bradley vs. Phœnix Ins. Co., 28 Mo. App., 7, (Phillips, J.) in which *four and a half* months of *six* were lost.

To these we add the recent case of *Law vs. New England Mutual Accident Association*, 94 Mich., 266, in which seven months of twelve had been lost.

In connection with the claim of waiver appellant's counsel lay much stress upon the fact that after the fire the appellee accepted the premium due on the policy in suit. It is difficult to see what bearing this has upon the issues now before the Court. In the first place, this was a debt which arose upon the execution of the policy, and, as pointed out by Judge Deady (record, p. 35) "should have been paid on the delivery of the policy, whether the insurance was in favor of Kearney alone, or he [him] and his successors, or whether the loss occurred during his receivership or that of Mr. Thompson." This circumstance is

only a part of the ground which supports the appellant's claim of waiver, and we think we have demonstrated that that entire issue has failed; and certainly it has no bearing upon the question as to whether the appellant's remedy upon the policy lay at law or in equity.

Again, Judge Deady is subjected to criticism for having in his opinion (record, p. 35) called attention to the fact, as shown by the records of his court, that a prior suit had been commenced in October, 1884, upon this same policy; that a demurrer was sustained to the bill in June, 1885, on the ground that the receiver had failed to secure leave of court before instituting his suit; that the suit was dismissed by Thompson July 10, and the present one thereupon instituted. Now, whether this Court may think Judge Deady was justified in not closing his eyes to the records of his own court in the same controversy, between the same parties, whether appellant's counsel prefer to have the record wholly silent on the matter, so that it will appear that Thompson lay idly by from August of 1884 to July of 1885, or to have presented to the Court such excuse as they may have to offer for this seeming negligence, is wholly immaterial. View the situation from any standpoint, and it is manifest that time was frittered away with a lavish disregard of consequences, while there was day by day growing to the hand of appellee a weapon which was destined to render it invincible against any attack.

Has the appellant any grievance in fact except such as arises from the action, or inaction, of those whose duty it was to guard the trust he now seeks to protect? His policy is to obscure the ruin which his predecessor brought upon his own head by aggressive assaults upon the appellee.

Finally, counsel for appellant urge that the limitation clause has no application whatever to this suit, as it is not a proceeding brought *upon* the policy within the purview of the clause, but to *reform* the policy, and they cite *Hay vs. Ins. Co.*, 77 N. Y., 235, and *Wells vs. Yates*, 44 Id., 532. So far as the last case may be said to have any application to the point, it is opposed to appellant's contention.

In the other case, the very purpose of the suit was to obtain a policy omitting the limitation clause, and the suit prevailed; also to obtain a policy essentially different in its terms and subject matter; the policy which the defendant had issued, and which plaintiff sought to reject, was one by which the company was "a mere guarantor of the collection of the mortgage and an insurer of the debt, a contract practically of no benefit either to the insurer or to the mortgagors." The suit was one to enforce the issuance of a policy in accordance with an antecedent agreement; it was not, as this is, a suit to reform one of the conditions of an accepted policy.

The purpose of the reformation here is not to change any of the stipulations of the policy, nor to make a new or different contract, but to enable the appellant, as successor of Kearney, to avail himself of the contract as a party thereto. If the relief were allowed, the policy would stand, with the limitation clause in full force, and such clause would be as complete a bar against the appellant as it would have been against Kearney. If the suit had been brought for reformation alone, and an action afterwards instituted to recover upon the policy as reformed, the action would have been clearly barred, and the appellant can gain no greater right because for convenience sake he is allowed to seek a double remedy in one proceeding. In the case of *Arthur vs. Homestead Fire Ins. Co.*, 78 N. Y., 462, which was similar to the one now under consideration, and in which the same use was attempted to be made of the *Hay* case, the court hastened to say it had no application. If any further authority upon this point is desired than what was said in this case by Judge Deady in 11 Saw., 276, and by Justice Harlan in 136 U. S., 296, we beg to refer to the opinion of Justice Field in *Davidson vs. Phœnix Ins. Co.*, 4 Saw., 594, and to *Farmers' Mutual Fire Ins. Co. vs. Barr*, 94 Penn. St., 345.

We believe this completes our answer to all the points made in the appellant's brief. The

defenses made by the appellee to the suit preferred against it have been characterized as unjust and unconscionable. The first position assumed by appellee that it had insured Kearney only and not his successors, although denied by this Court, was a substantial one, and, in the light of the facts we have above set forth, was from every standpoint a justifiable one. The defenses that the appellant's remedy was at law and not in equity, and that the suit was not brought within the period prescribed by the limitation clause will doubtless be claimed by appellant to be more technical than meritorious. But they are certainly as legitimate as that of the general plea of the statute of limitations, or that of want of protest and notice of non-payment; and they are more than that. No court will ever say it is a matter of reproach for a litigant to demand the right of trial by jury in an appropriate case, a right guaranteed in the most solemn and assuring manner and cherished above all others in our scheme of government. Nor is condemnation to be visited upon one who claims only to stand upon his contract, for contracts are made to govern the rights and liabilities of parties. And it is not too much to say that courts do poor service when they depart from principles which have become the foundation of the rights of persons and of property, have been made constituent parts of our social fabric, for the purpose of meeting the exigencies of special cases, as has

been done in so many of the instances referred to in this brief. The injury done the public infinitely outweighs the benefit conferred upon the individual.

If in thus presenting our views, we may seem to have incurred the criticism of needless prolixity, we beg to offer in extenuation our sense of the importance of the case, and the urgency of an early decision, which has led both parties to dispense with the supplementary aid of an oral argument. Without dwelling upon the considerations which were offered in the brief accompanying our petition for the writ of certiorari, and which seemed sufficient to the Court to warrant its allowance, we will content ourselves with saying that the amount of money involved in this suit is the least feature of its importance. The appellee desires a construction of its form of policy which represents a vast volume of business in all parts of the United States, and other insurance companies are just as vitally interested, for the determination of this cause will undoubtedly have great weight in shaping and directing the insurance law of the land; while the high authority of this Court can not fail to do much towards harmonizing the discord which now prevails in the adjudicated cases, and establishing the rights and liabilities of both insurer and insured on a basis which will enable them to better understand what these rights and liabilities are